

PEOPLE OF THE STATE OF ILLINOIS

VS

MARNI YANG

09 CF 926

FILED

FEB 26 2020

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**PEOPLE'S MOTION TO DISMISS
DEFENDANT'S POST-CONVICTION
PETITION**

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STATE OF ILLINOIS)
) SS
COUNTY OF LAKE)

IN THE CIRCUIT COURT OF THE NINETEENTH
JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
) vs. GENERAL NO. 09 CF 926
)
MARNI YANG)

PEOPLE’S MOTION TO DISMISS DEFENDANT’S POST-CONVICTION PETITION

Now come the People of the State of Illinois, by and through MICHAEL G. NERHEIM, State's Attorney, in and for the County of Lake, by Ken LaRue, Scott Hoffert, and Jason Humke, Assistant State's Attorneys, and moves this Honorable Court to dismiss Defendant’s Petition for Post-Conviction Relief filed October 1, 2019 (the “Petition”) and in support thereof states as follows:

I. INTRODUCTION

On October 4, 2007, Rhoni Reuter and her unborn child were executed in the final act of the Defendant’s ongoing jealous rage and obsession over Shaun Gayle. The Defendant executed Rhoni Reuter for the transgression of being Shaun Gayle’s girlfriend and executed her unborn daughter for the transgression of existing. For the next year and a half, the Defendant evaded justice until the strands of her malevolent plot finally unraveled. On March 15, 2011, after a two-week trial, a jury of the Defendant’s peers took three hours to declare her guilty of these despicable crimes. Now, some eight years later, after her appeals have been exhausted, she comes before this court claiming her constitutional rights were violated and that she is innocent

of the crimes she stands convicted of committing. She now claims for the first time that she knew all along she was being recorded at the Denny's restaurant all those years ago. This is exactly the opposite of what she argued at her trial. She now claims that she decided to make a false confession out of some vague concern that her son would be arrested for Rhoni Reuter's murder. She does not go to the police to provide this false confession. Instead, the Defendant claims she provided this false confession to a friend who she somehow knew was wearing a wire at the Denny's restaurant.

The fatal flaw in this new claim is the timeline. What the Defendant did not and could not have known when she was recorded bragging about murdering Rhoni Reuter over tea and ice cream at the Denny's restaurant is that her friend Christi Paschen had provided written statements to the police days before the two had met. These written statements contained key details the Defendant previously shared with Paschen about the murder that the Defendant subsequently recites nearly verbatim in her recorded conversations at the Denny's restaurant.

The only way Christi Paschen could have provided the same account to the police that the Defendant later recites is if the Defendant had previously divulged this to her. The only way the Defendant could have unwittingly provided this identical account during her recorded conversations is if she murdered Rhoni Reuter. These two people simply could not duplicate the same key details about Reuter's murder at different times and independent of one another unless these were details that had been previously discussed.

As illustrated in **Exhibit A** to this motion and discussed more fully in Section 22 below, these particular details about the murder would have also been unknown to the police. They could not have simply been "fed" to Christi Paschen during her interview, they could not have

been “fed” to the Defendant during her interrogation, and they certainly could not have been “fed” to the Defendant at the Denny’s restaurant. The Defendant’s claim of a “false confession” and indeed the entire assertion of her actual innocence thus ultimately collapses under the weight of this irrefutable logic.

The Defendant’s entire Petition is a skillful lawyerly rebranding of the facts and overwhelming evidence against her. Two of her children told the police that the Defendant was not home during the murder, and that she told them to lie and say she was. This is now spun as police coercion and subornation of perjury. Her best friend testified as to every heinous detail the Defendant told her about murdering Rhoni Reuter. This too is spun as the product of police threats. The Defendant’s entire defense at trial was that she *did not* know she was being recorded by her friend at the Denny’s so she was telling her friend a tall tale for her amusement. Now, some eight years after her trial, she spins this new story of a “false confession” to explain away the recording of her damning words she shared with her friend that ultimately brought her to justice.

The Defendant blames the police, the prosecutors, her lawyers, and her friends for her guilt. But after a careful review of the claimed evidence contained in her Petition, it does nothing to undermine the overwhelming evidence and the inescapable conclusion that the Defendant murdered Rhoni Reuter and her unborn child. The Defendant is as guilty today as the jury found her to be all those years ago. Her Petition fails to meet the legal requirements of the constitutional claims she now brings and therefore should be dismissed by this court.

II. PROCEDURAL HISTORY

1. On March 15, 2011, a jury found the Defendant guilty of First-Degree Murder and Intentional Homicide of an Unborn Child. After the two-week trial, the jury deliberated for approximately 3 hours to reach these verdicts. (R.004172). The jury also found that the Defendant personally discharged a firearm that proximately caused the death of Rhoni Reuter and that the murder of Rhoni Reuter was committed in a cold, calculated, and premeditated manner pursuant to a preconceived plan, scheme, or design to take a human life. Judgment was entered on these verdicts and the matter was continued until May 10, 2011 for sentencing.
2. The Defendant's trial counsel subsequently filed several post-trial motions. On April 14, 2011 the Defendant's trial counsel filed a motion for new trial listing approximately 60 contentions of error. This motion was denied on May 10, 2011.
3. On April 16, 2011, the court entered an agreed order allowing photographing and inspection by defense investigators of "People's Exhibit 5," the medic alert bracelet admitted at trial and referenced in the Petition.
4. On April 27, 2011, the Defendant's trial counsel filed a "Motion to Vacate All Judgments and Dismiss Indictment With Prejudice: Brady v. Maryland Violations." This motion argued in pertinent part that cell tower location data referred to on a news program that aired after the trial was not disclosed to the defense prior to trial. This motion was also denied on May 10, 2011.
5. On that same date of May 10, 2011, the Defendant was sentenced to two concurrent terms of imprisonment for the duration of her natural life.

6. On May 31, 2011, the Defendant's trial counsel filed a motion to reconsider her sentence listing several claims of error. Argument was heard on this motion on June 6, 2011. At the Defendant's insistence, an additional claim of error was added to the motion regarding the prosecution's reference that she was a "sociopath." (R.004223). On that same date, this motion was also denied.
7. On June 6, 2011 the Defendant filed her notice of appeal.
8. On January 22, 2013, the Defendant's conviction was affirmed on appeal. *People v. Yang*, 2013 IL App (2d) 110542-U.
9. On May 29, 2013, the Defendant's Petition for Leave to Appeal to the Illinois Supreme Court was denied. *People v. Yang*, 39 N.E.3d 567 (Table).
10. Subsequent to the denial of her appeals, several orders were entered in this cause pursuant to motions made on behalf of the Defendant. On September 11, 2014 the court entered an order allowing defense to conduct DNA testing of the live rounds and shell casings found at the crime scene. On June 23, 2016 the court entered an order allowing defense to conduct DNA and fingerprint testing of the doorknobs taken from the doors in the victim's apartment and the bracelet entered into evidence at trial. On March 1, 2018 the court ordered that the clerk make available for review, inventory, and photography, of all documents, photographs, and tangible things in evidence. On April 26, 2018, the court ordered the Defendant's trial attorneys make available their entire trial files to the defense. Also, on April 26, 2018, the clerk was ordered to make available for defense testing all projectiles, shell casings, live round, the trash can, purse, tote bag, tan shirt, black dress, black leggings, black toe socks, and shell gas station video. On July 12, 2018, the court ordered the Cook County State Attorney's Office to turn

over the original wireroom recordings to the defense for copying and testing and ordered the Northeastern Illinois Regional Crime Laboratory to turn over the known DNA profile of the victim and the latent lifts recovered from the doorknobs. On July 13, 2018 the court entered an agreed order for the Deerfield Police Department to make available for examination, photographing, and inventory by the defense all evidence collected in the homicide. And finally, on August 1, 2018, the court entered an order for the prosecution to tender the “Rule 417” discovery from the Northeastern Illinois Regional Crime Laboratory to the current defense team.¹

11. On October 1, 2019 the Defendant filed this Petition for post-conviction relief.

III. EVIDENCE ADDUCED AT TRIAL AND PRIOR RECORD OF PROCEEDINGS

12. The People’s evidence against the Defendant at trial was well-summarized in the appellate court’s opinion affirming her conviction. *See Yang*, 2013 IL App (2d) 110542-U, ¶¶ 4-30. The appellate court found this evidence to be “overwhelming.” *Id.* at ¶ 80. Although this evidence produced at trial was voluminous, several important facts relevant to the instant Petition warrant highlighting for the purpose of determining if the Defendant has met her burden at this stage in the proceedings of making a substantial showing of her constitutional claims.

13. At the outset, the record of proceedings in this case indicates that the Defendant was interrogated by the police between January 4th through the 6th, 2008.² The Defendant’s

¹ Although the People did not present DNA evidence at the trial, the original “Rule 417” Discovery for this evidence was also previously tendered to the Defendant’s trial counsel on October 10, 2010 and was marked PF 8026-8391. (R.000201).

² The Defendant’s interrogation is relevant because she now claims in her Petition that this was how she learned the key details about the crime scene from the police that end up on the “Denny’s” recordings. (Petition, para. 62)

interrogation was made of record in these proceedings because the defense moved to suppress the statements she made during her custodial interrogation. The court viewed the approximately 9 hours of video recorded interrogation during the motion to suppress the Defendant's statements. (R.000140-47). As the court observed during this interrogation, the Defendant advanced a similar but more rudimentary version of the "alibi" defense that she now advances in this Petition, though her statements to the police appear to contradict her current claims in several respects. For purposes of her Petition at this stage of proceedings, however, it suffices to say that the Defendant's statements to police regarding her "alibi" never accounted for her Enterprise rental car purchases or her disposable TracFone because the police didn't discover this evidence until much later in the investigation.

14. The court ruled that the Defendant's statements made during that interrogation should be suppressed with the caveat that, if she testified at trial, the state would be allowed to cross examine her regarding the statements she made to law enforcement officers. (R.000501). The Defendant elected not to testify at trial. (R.003910).
15. At trial, two witnesses provided a description of the suspected shooter at the trial. Witness Peter Cowles was the first of these witnesses. (R.002368-400). Cowles testified that while leaving his home to go to the gym he observed what appeared to him to be an African American boy running up to a black car, which was about the same as Cowles' own car (a Toyota Corolla). (R.002371). Cowles was surprised when the individual opened the door to the black car to get in because he did not understand how a kid of that age could be driving. (R.002377). Cowles testified that he believed the individual was a 12 to 13-year-old boy. (R.002377). He surmised who he saw was a 12 or 13 year old boy because he was short, he was dressed like a

boy would be dressed, and he had hair piled up on the top of his head that was pinned down with bobby pins or something. (R.002377). He observed that the individual's skin color was black. (R.002378). The individual in terms of build, physical characteristics, height, and weight, appeared to look like a 12 to 13-year-old boy. (R.002385). Cowles could not identify the Defendant as the person he saw. (R.003900).

16. Witness Manda Hussain (maiden name Cameron) also testified regarding a description of the suspected shooter. (R.003609-39). She testified that, while she was leaving for work, she saw someone walking on the sidewalk who was dressed in a very odd manner. (R.003622). The person was wearing a dark, baggy track suit and had face paint and a wig on, which she described as being very odd. (R.003622-23). Hussain specified that the clothing was baggy and dark colored that she believed was black. (R.003625). She also stated that she knew this individual as wearing a wig because you could see the shiny wig cap and it looked shiny and peach or pink in color. (R.003625-26). She stated that the individual's face was painted dark because the scalp skin and the face skin did not match. (R.002626). When describing why she identified it as face paint, Hussain stated it looked like face paint rub because she could see it glitter. (R.002626). She described the wig as black and cornrow style. (R.002626). She estimated that this individual was probably a little bit taller but not a lot taller than her height, which was five feet tall. (R.003626). Hussain said she saw this individual going into the door of the apartment building and walking quickly, hopping up the stairs. (R.003627-28). She testified that a key wasn't required to enter the front door of the apartment building. (R.003629). Finally, Hussein testified that what drew her attention to this strange individual

was the strange costume because it was too early for Halloween and it was very strange. (R.003635).

17. Shaun Gayle also testified at Defendant's trial. (R.002804-902). He testified that he had email conversations with Reuter discussing her pregnancy. (002835). He also testified that, in July or August 2007 he has a conversation with Reuter about telling the other people in his life that she was pregnant. (R.002830). It was the day after this conversation with Reuter that Gayle told the Defendant that Reuter was pregnant and that he was going to be a father. (R.002830-34). Gayle testified that the Defendant did not appear surprised. (R.002834). He testified that he saw the Defendant on October 3, 2007, at between approximately 7 and 7:30 P.M. (R.002836). She asked to come over because of a "time sensitive" matter regarding real estate. (R.002836). The Defendant brought food, because he had sustained a hip injury as a result of a motorcycle accident. (R.002838-39). Gayle testified that other women he had been involved with had been receiving harassing letters and that they had shown him these letters. (R.002867-68). Gayle identified the letter found in Rhoni Reuter's purse after her murder (People's Exhibit 46A) as the same kind of letter he was shown by the women he knew. (R.002868). He also identified the draft letter found in the Defendant's home, (People's Exhibit 80A) was the same type of letter he had previously been shown, with the exception of an additional name added to the list of women. (R.002869-70). He identified the names of all 18 women listed on People's Exhibit 80A as names of women he knew and stated that he corresponded with all of these women by e-mail in the last two to three-year period. (R.002870-72). He also stated that the address label on the letter found in the Defendant's home (People's Exhibit 80A) listing

his name was not placed on the envelope by him and he gave nobody authority to put his name on that address label. (R.002898).

18. Two of the Defendant's friends and co-workers testified as to the Defendant's obsession with Gayle. Julie Fields, the Defendant's former friend testified first. (R.2908-34). She stated that the Defendant told her she was dating Gayle, but that Gayle dated other women as well. (R.002915-16). Defendant told Fields that she had access to Gayle's contacts and his email from his computer at his residence, so she was able to get the names and addresses of the other women Gayle was seeing. (R.002916). The Defendant claimed she had a program to get Gayle's email password. (R.002917). Fields said that the Defendant told her she was able to access his email when she was at his residence and he was in the other room. (R.002917). She also told Fields that she would study the emails between Gayle and a Polish woman who wrote to him in broken English. (R.2918). The Defendant told Fields she posed as this Polish girl and sent emails to the other women in Gayle's contact using the same broken English and made threats to them to deter his other relationships. (R.002918-19). Defendant told Fields that she learned that charges had subsequently been filed against the other girl for what the Defendant had done. (R.002920).
19. Fields also testified about how the Defendant would talk to her about Rhoni Reuter. (R.002922). In conversations with Fields where the Defendant would compare herself to Rhoni Reuter, the Defendant stated that she knew where Reuter lived, that she knew Reuter lived in a two-bedroom condo in Deerfield, and that Reuter worked at Macy's. (R.002922-23). The Defendant also told Fields about an occasion where she accessed Gayle's e-mail, discovered

that he had booked a trip to Europe with Reuter, and she called up posing as a third person to cancel the hotel that Gayle had booked. (R.002924-25).

20. Julie Fields testified about an occasion where the Defendant contacted her and told her she learned from accessing Gayle's e-mail that Gayle had met another woman. (R.002926). The Defendant told Fields that she used Gayle's e-mail to contact this other woman's fiancé, and she wanted Fields to call the other woman and tell the other woman that she (Fields) was dating Gayle. (R.002925-27).

21. Marguerite (Maggie) Zimmer, a former co-worker of the Defendant, also testified. (R.002934-56). The Defendant would tell Zimmer how she was excited to be involved with Shaun Gayle. (R.002940-42). The Defendant also told Zimmer how she had access Gayle's e-mail and she would make comments, apparently while reading Gayle's e-mail, about how many girls are e-mailing him. (R.002945-46). The Defendant told Zimmer how she acquired Gayle's e-mail password while he was in the shower at his apartment. (R.002946). Finally, Zimmer testified about how the Defendant sent her an e-mail at 9:31 P.M. on October 3, 2007 (People's Exhibit 315) that said she was having car trouble and wouldn't be at work the next morning. (R.002949-52).

22. The Defendant's daughter, Emily Yang testified at Defendant's trial. (R.002957-71). Emily Yang also testified that the Defendant told her how she got into Gayle's e-mail accounts. (R.002959-60). The Defendant told her daughter that she knew Gayle was seeing other women and she would send letters to these other women (R.002961-62). On cross examination, she went into the details of how she was interviewed by police on January 4, 2008. (R.002965-71). During sidebar objections, the handwritten statement that Emily Yang gave to police on

January 4, 2008 was referenced. (R.002968-69). Specifically, the portion of the statement where the Defendant told Emily Yang to tell the police she was home with car trouble the morning of Reuter's murder. (R.002969). This written statement given by Emily Yang was also attached to the People's Supplemental Motion *in Limine* Regarding 404(b) Evidence filed February 28, 2011 and is part of the court record. (C.000650).

23. Regarding the documentary evidence adduced at trial relevant to the Defendant's Petition, much of the evidence was linked to the Defendant's TCF bank account statements, which were admitted by stipulation. (R.002568-69). These TCF bank transactions linked the Defendant to her purchases at the National Data Research background check company. (R.002591-93). They also linked the Defendant to her purchases of her disposable silencer book on August 3, 2007. (R.002668-70). They linked the Defendant to purchases she made at Wal-Mart store on September 26, 2007 at the same date, time, and location she purchased her Tracfone disposable cellphone where she paid for the phone in cash. (R.003561-62). The TCF bank statements also linked the Defendant to her purchases at Walgreens on October 3, 2007 of socks, a hair net, a swim cap, batteries, and two alarm clocks. (R.3640-41). Finally, these bank records linked the Defendant to the Home Depot "silencer material" purchases on August 4, 2007 and the bucket of cement presumably used to dispose of the murder weapon on October 5, 2007.³ (R.002624-25).

³ In addition to the TCF records, the Defendant is observed on video at Home Depot purchasing a bucket of anchor cement the day after the murder, on October 5, 2007. (003698-003700). Presumably this is the bucket of cement Defendant refers to with Christi Paschen. (R.003384). This is also presumably the same bucket of cement the Defendant refers to while being recorded at the Denny's restaurant on March 2, 2009. (R.003522).

24. The evidence adduced regarding National Data Research (People's Exhibits 103-105) was that this was a company that provided background checks on people and that the Defendant used it on August 2, 2007 to run a search on the license plate of the vehicle belonging to Rhoni Reuter as well as searches on the names, addresses, and phone numbers of other women associated with Shaun Gayle. (R.002972-74). These names, addresses, and phone numbers the Defendant ran background checks on matched the names and addresses found on address labels found in the Defendant's residence. (R.002994-003011). They also matched the names and addresses found in an unsent form letter found in the Defendant's residence, (People's Exhibit 80A). R.002994-003011). They matched the names and addresses in the letter found in Rhoni Reuter's purse when she was murdered (People's Exhibit 46A). (R.002994-003011).
25. The Defendant's purchase of the books "How To Make a Disposable Silencer, Volumes 1 and 2" was discussed at trial by Larry Riling, the owner of the Ray Riling Arms Books Company. (R.002601-21). He described for the jury his company's website, and where to find the silencer books on the website that the Defendant purchased on August 3, 2007 (R.002603-12). Riling went through the invoice he kept of the Defendant's purchase and noted that the Defendant purchased two different books (volumes 1 and 2) in her order. (R.002615-16). Each volume cost \$18.95. (R.002616). The Defendant also requested overnight delivery by express mail for an additional charge of \$20. (R.002616). The express mail contained a United States Post Office Tracking number (R.002620). The parties stipulated that the package containing the silencer books was signed for by M. Yang on August 4, 2007 at 11:10 A.M. (R.002622).
26. The Defendant's ex-boyfriend Salvadore Devera also testified regarding these homemade silencer books. (R.003061-003266). He testified that on his birthday, September 20, 2007, the

Defendant gave him as a birthday present a homemade silencer book. (R.003084-86). He couldn't remember if it was one book or two. (R.003085-86). He testified that this made him angry because he was helping her with paying the bills at the time and this gift seemed to be useless and a waste of money. (R.003086). He told the Defendant that he had no use for such a book, and he left the book there. (R.003087).

27. Mr. Devera also confirmed that he took the Defendant to the range to shoot a 9mm Beretta she had brought back from Florida, and that when he was with her at the Illinois Gun Works gun range he had the grips changed out for her. (R.003076-84). Finally, Devera told the jury that the Defendant never told him that this 9mm Beretta was stolen at any point. (R.003079). As he put it, "that would be a big deal." (R.003079). When asked by the defense during an offer of proof about a family meeting the Defendant had with her children regarding things stolen from the house, Devera was adamant that none of the items missing were firearms. (R.3105-12). As he clarified "*that would be something that would be as I stated previously that would be a big deal. Missing weapons would be a lot more something to think and worry about than missing camera or video game system.*" (R.003113) (emphasis added).

28. Don Mastrianni, the owner of the Illinois Gun Works shooting range, also testified regarding the Defendant possessing the Beretta 9mm. (R.003148-82). Mastrianni recalled the Defendant coming to the range with Devera to build up her marksmanship and practice with the Beretta 9mm. (R.003163). He recalled changing out the white, pearl grips of the Beretta for the Defendant during one of the times she was at the range with Devera. (R.003163-64). Mastrianni stated that he put the old pearl handle grips in the Beretta packaging that contained the grips he sold to the Defendant and put on her Beretta 9mm. (R.003169-70). Mastrianni

testified that he believed he changed out the grips for the Defendant between July and September 2007. (R.003170). He did acknowledge, however, that he may have told the police that he changed out the grips for the Defendant a year prior, around January 2007 because the Defendant came into the store multiple times with Devera. (R.003175-76).

29. Regarding forensic testing of the unfired live rounds and shell casings found at the crime scene, Peter Striupaitis from the Northeastern Illinois Regional Crime Laboratory testified regarding his examination of these items. (R.003222-94). He testified that he examined the shell casings and unfired rounds found at the crime scene under a microscope and determined the rounds were all ejected from the same 9mm firearm (R.003242-71). He also testified that he couldn't determine whether or not a silencer was used on the weapon that fired the bullets into Rhoni Reuter because he would have to know the exact materials that were used and exactly how the silencer was constructed to make a comparison. (R.003277-78). Finally, Striupaitis testified that he examined firearms belonging to Shaun Gayle, Salvadore Devera, and firearms found at the Defendant's mother's house, and determined that none of these firearms made the marks on the shell casings and live rounds found at the crime scene. (R.003279-84).
30. The parties also stipulated to the receipts of the Home Depot purchases using the Defendant's TCF bank debit card that were made on August 4, 2007 at 7:28 P.M. for \$82.02 and another purchase at 9:49 P.M. for \$8.03. (R.002624-25). There was also a stipulation as to the Home Depot video surveillance video identifying the Defendant purchasing the bucket of anchor cement, sponge mop, smoke detectors, and a Dremel tool at 9:18 P.M. on October 5, 2007. (R.002625).

31. The prosecution admitted evidence that the Defendant's work computer at "The Source" was searched by a forensic computer analyst on December 13, 2007 (R.003021-23). From the search of the Defendant's work computer hard drive, a MapQuest driving directions route search was located from the Defendant's workplace to Rhoni Reuter's home address. (R.003031). It was also discovered on this hard drive evidence of internet usage on September 17, 2007 to conduct video or image searches for Rhoni Reuter. (R.003033-35).
32. There was also evidence admitted of the smashed computer hard drive found in the garbage at the Defendant's home shortly after the murder on October 8, 2007. (R.002575-78). This hard drive found in the Defendant's garbage was purposefully destroyed, as it was broken into two pieces, and it was unable to be analyzed. (R.003039-49).
33. Regarding evidence adduced at trial concerning the Defendant's TracFone disposable cellphone, the evidence showed that this phone was purchased at Wal-Mart on September 26, 2007 using cash, and that the phone number assigned to this phone was not registered. (R.003560-63). The phone number of this TracFone tied the Defendant to both her rental car purchases and to her phone call to her friend Christi Paschen's workplace made shortly after the murder. (R.002312-14).
34. Records regarding the Defendant's Enterprise Rent-A-Car rentals were also admitted at the Defendant's trial. (R.003641-88). These records by Enterprise Rent-A-Car established, in summary, that the Defendant was picked up from the residence of her friend Christi Paschen in the afternoon on October 2, 2007, she was taken to the Enterprise location in Mount Prospect, where she rented a blue Kia Rondo SUV. On October 3, 2007, she then switched out the blue SUV for a black Volkswagen Rabbit. She returned the black Volkswagen rental car

on October 4, 2007 at 9:21 a.m. just after the murder. The evidence supporting these conclusions was quite irrefutable.

35. As the testimony concerning these business records adduced, on October 2, 2007, Enterprise picked the Defendant up at the address she provided, 2125 Tonne by Tanglewood Apartment. (R.003660-62). This was the address for Christi Paschen's residence. (R.003348). The Defendant was then taken to the Enterprise location in Mount Prospect. (R.003670). In order to rent a car, the Defendant would have had to have furnished her driver's license. (R.003646). Information recorded by Enterprise including the Defendant's name, date of birth, address, and driver's license number was taken from that driver's license while she was at the counter applying to rent the car. (R.003651-53). The Defendant also signed this rental agreement in multiple places. (R.003655). The records show that the Defendant paid cash for this car rental. (R.003660). In order to provide a deposit on the rental car however, the Defendant provided credit cards belonging to her father Larry Merar and her boyfriend Salvador Devera (R.0003665-67).⁴ The records show that the Defendant returned and paid for this car on October 4, 2007 at 9:21 AM, approximately an hour and half after the murder of Rhoni Reuter. (R.003660-64).

36. Records from Enterprise also revealed that the mileage on the first car rented by the Defendant from October 2, 2007 to October 3, 2007 was a blue Kia Rondo SUV. (R.003650). When returned, the vehicle had only been driven 5 miles. (R.0003670-72). This distance was determined by investigators to be consistent with a trip to and from Christi Paschen's residence. (R.003759-60). Enterprise records also show that the second vehicle rented by the Defendant

⁴ Devera later testified that the Defendant would keep a copy of his credit card. (R.003098-99).

from October 3, 2007 to October 4, 2007, which was the 2008 Volkswagen Rabbit, had been driven 40 miles. (R.003670-72). This distance was determined by investigators to be the exact same distance as a trip from the rental car location to Paschen's residence, then to the victim's residence, then back to Paschen's residence, and then back to the rental car location. (R.003768-71).

37. Christi Paschen testified during the Defendant's trial. (R.003306-3557). During her testimony, Paschen told the jury how the Defendant was frustrated with Shaun Gayle seeing other women. (R.003462). She had told Paschen how she was able to gain access to Gayle's e-mail and learn about the other women he was seeing (R.003330). She also told Paschen about these other women and the nicknames she had for them. (R.003328). Paschen recalled the nicknames "Ms. Macy's, Ms. Japan, and Ms. California" that the Defendant used when referring to the names of the other women she learned Gayle had been seeing from hacking into his e-mail. (R.003328-29). The Defendant told Paschen how she printed out these e-mails from Gayle's e-mail account and sent them along with letters to these other women. (R.003332). The Defendant also sent herself a similar letter so she wouldn't appear to have been the sender. (R.003332).

38. The Defendant confided in Paschen that she learned from accessing Gayle's e-mail that one of his girlfriends, Rhoni Reuter, whom she had nicknamed "Ms. Macy's" was pregnant by Gayle and that he was going to be a father. (R.003339). The Defendant then told Paschen that she was contemplating murdering Reuter. (R.003339). Four weeks prior to the murder, the Defendant expressed again her desire to murder Reuter stating that she didn't believe Gayle

deserved to have a child. (R.003346). A week later, the Defendant told Paschen that she had gone to Reuter's residence with a gun and was contemplating killing her. (R.003346-47).

39. Paschen told the jury that on October 3, 2007, the night before Reuter's murder, the Defendant spent the night at Paschen's residence in Arlington Heights. (R.003347-48). The Defendant told Paschen that she had just come over from Gayle's residence, and that she had now decided to murder Reuter. (R.003348). Paschen stated that they spoke for several hours on this topic and the Defendant had Paschen perform a tarot card reading to determine if her plot to murder Reuter would be successful. (R.003349-50). The Defendant told Paschen that she would think about whether she would go through with murdering Reuter and, if she did kill Reuter, she would signal Paschen by calling her at her workplace and asking her to dinner. (R.003353).
40. Paschen testified that she went to sleep and when she woke up the next morning the Defendant was gone. (R.003354). Paschen went to work and then received a phone call from the Defendant on her recorded work line from phone number 312-608-5423, which was a number Paschen had not known Defendant to have used before. (R.003355-56). This phone call was in fact made from the Defendant's TracFone. (R.003561-63). On this call, the Defendant delivered the code words to Paschen that she had gone through with her plan to murder Reuter. (R.003373). The recording of this phone conversation with the code words of asking Paschen out to dinner was played for the jury. (R.003370-73). The jury also heard the recorded call Defendant made to Paschen at work later that afternoon where she called from her known cellphone number and arranged to meet Paschen at her apartment and bring dinner. (R.003377).

41. Paschen told the jury that when the Defendant came over to her house on the night of October 4, 2007, she told Paschen how she murdered Reuter. (R.003379). The Defendant told Paschen details about the murder and how she committed it. She told Paschen about the disguise she was wearing – dark sweatpants, a hoodie sweatshirt, and dark makeup to change her skin color. (R.003379). She also told Paschen how she wore a dark wig and had the hood pulled up during the murder. (R.003380). She told Paschen about how she rented a car and paid cash and left in the rental car from Paschen's apartment to get to Reuter's residence. (R.003380). She told Paschen about how she waited outside Reuter's apartment, and when Reuter opened the door, how she shot Reuter and pursued Reuter into the kitchen where she continued to shoot her. (R.003380). Paschen recalled the Defendant told her about how she observed an ultrasound photograph on the refrigerator. (R.003380). She also told Paschen about how she saw papers related to Reuter's pregnancy and a medical alert bracelet that she decided to take. (R.003382-83). She told Paschen that she drove the rental car back to Paschen's apartment (R.003384).
42. Paschen described how the Defendant took her on a drive on the evening after the murder, and how Defendant stopped at dumpsters to throw away evidence. (R.003390-003408). During this trip to various dumpsters, Paschen observed the Defendant throwing away a package marked "Beretta." (R.003394). She also observed the Defendant throwing away the sweatpants, sweatshirt, and wig. (R.003395). The Defendant also had Paschen assist her in throwing away a license plate she stated that she stole and placed on the rental car. (R.003407). Paschen also observed the Defendant using a small spade to dig a hole in the ground near the Meridian Banquet Hall. (R. 003414-16). Regarding this, Paschen testified that she didn't see what

Defendant buried but she thought Defendant had told her at one point that it was “some sort of pin thing.” (R.003416).

43. At trial, Paschen testified at length regarding the prior written statements she gave to police concerning details Defendant had told her about Reuter’s murder and efforts to dispose of the evidence. (R.003545-56). Paschen testified that she spoke to the police on February 27th, February 28th, March 1st, and March 2nd, 2009. (R.003419). Paschen wrote three statements for the police documenting the details she recalled about what Defendant told her. (R.003548). At trial, Paschen was shown People’s Exhibit 322, which was the statement she signed on February 27, 2009, People’s Exhibit 320, the statement she signed on February 28, 2009, and People’s Exhibit 321, which was the statement she signed on March 2, 2009. (R.003548-49).
44. Regarding Paschen’s February 27, 2009 statement, Paschen told the police specifically how Defendant described to her how she first encountered Rhoni Reuter the morning of her murder and how she went about shooting Reuter. (R.3553). Paschen told the police that the Defendant said to her that when Rhoni Reuter opened the door she saw the Defendant standing there, opened her mouth to scream, and that’s when the Defendant said she started shooting at Reuter. (R.003552). The Defendant told Paschen that she felt she had to move forward because there was no way out at that point, so she just started shooting. (R.003552-53).
45. Paschen also acknowledged that she told the police in her February 27, 2009 signed statement how Defendant previously described Reuter falling backwards to the ground as the Defendant continued to shoot, and that she had to push or kick Reuter’s foot away in order to close the door after the shooting. (R.003555). Paschen previously told the police in her written statement

that Defendant had told her that the apartment was dark, and she couldn't see what part of Rhoni Reuter's body she had struck. (R.003552).

46. Paschen told the police on February 27, 2009 how the Defendant stated she was in disguise when she shot Reuter. (R.003549). She also told the police that the Defendant stated she wore a wig. (R.003550). Paschen also told police how Defendant observed an ultrasound photograph on the refrigerator in Reuter's apartment. (R.003550). Finally, Paschen previously told the police how the Defendant dumped the disguise she was wearing in a metal bin after the murder. (R.003552).

47. As the trial record indicates, Paschen disclosed all these key details to the police in written statements provided on February 27 and February 28, 2008, prior to Paschen wearing the body wire and having the recorded conversations with Defendant at the Denny's restaurant. (R.003553).

48. On February 28, 2009, Paschen agreed to wear a body wire. (R.003432). She contacted the Defendant via telephone for a pre-planned recorded phone call. (R.003432-35). This recorded phone call occurred on February 28, 2009 at 11:33 P.M. (R.003432-35). The recorded phone call was admitted as evidence in the Defendant's trial as People's Exhibit 298 and was published to the jury along with the accompanying transcript, People's Exhibit 299. (R.003432-35).

49. Since paragraph 66 of the Defendant's Petition mischaracterizes the content of this recording, the accompanying transcript, People's Exhibit 299 is attached to this motion.⁵

⁵ This recorded call is the one with the Defendant using the phrase "make shit up" that is on the CD marked as Exhibit 22 of the Defendant's Petition. As discussed in paragraph 259, *infra*, this Exhibit 22 is a selectively edited

50. Regarding this February 28, 2009 recorded phone conversation, Paschen told the jury that she deliberately mentioned to the Defendant being questioned by the police about a disposable cell phone and a rental car record in order to prompt the Defendant to discuss these details with Paschen in a subsequent recorded conversation. (R.003572). During this call, immediately after Paschen tells the Defendant the police questioned her concerning a disposable phone, and a rental car agreement the Defendant tells Paschen “alright we’ll start making shit up.” (See People’s Exhibits 298, 299).
51. On March 1, 2009, Paschen showed the police the location where she observed the Defendant digging the night of the murder (R.003557). This was at the Meridian Banquet Hall. (R.003414-17). Officer Chris Fry, of the Deerfield Police Department testified how he and three evidence technicians dug around in the area Paschen had described to possibly find what the Defendant had buried. (R.003565-3573). He testified how they used a metal detector and how it detected a metal object. (R.003573). Officer Fry testified how he used his hands to break up the dirt and located the pearl medical alert bracelet with the words “pregnant” on it that was admitted at trial as People’s Exhibit 5 (R.003576). A photograph of this bracelet was identified by one of Reuter’s co-workers, Valerie Hicks Thomas as belonging to Reuter. (R.003591). Evidence was also admitted by stipulation that Shaun Gayle, Wayde Reuter and several other associates of Rhoni Reuter could not recall Rhoni Reuter wearing such a bracelet, however. (R.003902).

version of People’s Exhibit 298. Paragraph 66 of the Defendant’s Petition misquotes this phrase and misidentifies it as referring to Defendant’s son who is never mentioned during the February 28, 2009, 11:33 P.M. recording.

52. On March 1, 2009, at 10:09 P.M., Paschen called Defendant on another pre-planned recorded phone call. (R.003437). In this call, Paschen arranges for Defendant to meet her at the Denny's restaurant they would frequent in order to attempt to get her to talk about the murder while being recorded. (R.003440-41).
53. On March 1, 2009 at 10:32 P.M., Paschen met the Defendant at the Denny's restaurant while wearing a body wire recording device. (R.003440-42). This recording was admitted as People's Exhibit 291 and the recording and accompanying transcript (People's Exhibit 291) was published for the jury. (R.003442). During this March 1, 2009 conversation, the chief topic of conversation between Paschen and the Defendant was coming up with an explanation for the Enterprise car rentals and the TracFone disposable Phone. (R.003445-47).
54. On March 2, 2009, at 7:34 P.M., the Defendant again met with Paschen at the Denny's Restaurant and was recorded by Paschen on a body wire recording device. (R.003450-51). This recorded conversation was admitted at trial as People's Exhibit 292 and published to the jury along with the accompanying transcript, People's Exhibit 290. (R.003449-57). In this recording, the Defendant provided Paschen with a similar account of how she went about shooting and killing Rhoni Reuter as she had told Paschen on previous occasions. (R.003457-59).
55. The Defendant's Exhibits 23 and 24 of her Petition are heavily edited versions of the March 1, 2009 and March 2, 2009 recorded Denny's conversations admitted at trial as People's Exhibits 291 and 292 respectively. Since the allegations of these two recordings at the Denny's restaurant are mischaracterized in the Defendant's Petition as the Defendant making some sort

of false confession, the complete transcripts of these recordings that were admitted at trial as People's Exhibits, 290 and 291, are there attached to this motion for the court's consideration.⁶

IV. APPLICABLE LAW

56. At this stage of post-conviction proceedings, the trial court reviews the petition and accompanying documentation to determine whether a defendant has made a "substantial showing" that a constitutional violation occurred. *People v. Edwards*, 197 Ill.2d 239, 246 (2001). A defendant has the burden of demonstrating this substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill.2d 458, 473 (2006). A "substantial showing" of a constitutional violation is a measure of the legal sufficiency of a defendant's well-pled allegations of a constitutional violation which, if proved at an evidentiary hearing, would entitle him to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. To make this substantial showing of a constitutional violation, a petitioner's allegations "must be supported by the record in the case or by its accompanying affidavits." *People v. Coleman*, 183 Ill.2d 366, 381 (1998). When determining whether a defendant has made a substantial showing, "well-pleaded factual allegations not positively rebutted by the trial record must be taken as true for purposes of the State's motion to dismiss." *People v. Sanders*, 2016 IL 118123, ¶ 42 quoting *Pendleton*, 223 Ill.2d at 473. Claims which are contradicted by the record of the original trial proceedings may be dismissed. *People v. Jackson*, 197 Ill.2d 216, 222 (2001).

⁶ The recordings and accompanying transcripts admitted at trial were redacted to eliminate references of the Defendant telling Paschen about her conversations she had with her attorneys regarding how to spin the rental car and TracFone evidence. (R.001008-22). Given the Defendant's characterization of these recordings as a false confession in her Petition, the People contend that the redactions involving the Defendant's conversations with her attorney are now relevant to rebut this characterization.

“[N]onfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act.” *People v. Rissley*, 206 Ill.2d 403, 412 (2003).

57. At the second stage of post-conviction proceedings, claims based on allegations that are “contradicted by the record from the original trial proceedings” are insufficient to require a hearing. *Coleman*, 183 Ill.2d at 382. The “record” consists of the common-law record, the report of proceedings, and the trial exhibits. *People v. Blanchard*, 2015 IL App (1st) 132281 ¶ 18 citing Ill. S.Ct. R. 324. Finally, the trial court is not permitted to assess the credibility of potential witnesses, no matter how incredible and unbelievable those witnesses may be. *See Sanders*, 2016 IL 118123, ¶ 42 (trial court not permitted to rely upon previous finding of unbelievability of a witness in a different proceeding at second stage of post-conviction proceedings).
58. Furthermore, a post-conviction petition is a collateral attack upon a prior conviction and sentence, rather than a replacement for a direct appeal. *People v. Tenner*, 206 Ill.2d 381, 392, (2002). As such, postconviction proceedings are limited to “constitutional matters that have not been, nor could have been, previously adjudicated.” *Rissley*, 206 Ill. 2d at 412. Any issues which were decided on direct appeal are barred by *res judicata* and any issues which could have been raised on direct appeal but were not are defaulted or forfeited. *Tenner*, 206 Ill.2d at 392; *People v. Reyes*, 369 Ill.App.3d 1, 12 (1st Dist., 2006).
59. Additionally, at the second stage of post-conviction proceedings, a motion to dismiss may challenge the non-jurisdictional procedural defects of a petition’s failure to comply with the Post-Conviction Hearing Act. *People v. Allen*, 2015 IL 113135, ¶ 34-35. Pursuant to Section 122-1 of the Act, the petition must be verified by a verification affidavit. 725 ILCS 5/122-1(b).

Under the Act, a petitioner is also required pursuant to Section 122-2 to support claims by notarized evidentiary affidavits or explain their absence. 725 ILCS 5/122-2. Failure to verify the Petition with the required verification affidavit or support the petition by evidentiary affidavits is grounds for dismissal of those claims at the second stage of proceedings. *People v. Allen*, 2015 IL 113135, ¶ 34-35, *People v. Spivey*, 2017 IL App (2d) 140941, ¶ 17; *People v. Velasco*, 2018 IL App (1st) 161683) ¶¶98-104.

60. The purpose of this verification affidavit is to confirm that the allegations were brought “truthfully and in good faith.” *Allen*, 2015 IL 113135, ¶ 27. (Internal quotation marks omitted.) The purpose of evidentiary affidavits is to (1) contain a factual basis to demonstrate the petition's allegations are capable of objective corroboration, and (2) “identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations.” *Id.* at ¶ 32 (*quoting People v. Delton*, 227 Ill. 2d 247, 254 (2008)). To be an affidavit, a statement must be notarized and must be “sworn to before a person who has authority under the law to administer oaths.” *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494 (2002). An affidavit that is not sworn to or notarized is a nullity. *Id.* at 497.
61. Finally, at the second stage of post-conviction proceedings, affidavits that are hearsay are typically insufficient to warrant an evidentiary under the Act and may be challenged on that basis. *Velasco*, 2018 IL App (1st) 161683) ¶¶9120; *People v. Walker*, 2015 IL App (1st) 130530, ¶ 25, *citing People v. Brown*, 2014 IL App (1st) 122549, ¶ 58.

A. Actual Innocence Claims

Regarding constitutional claims of actual innocence, a petition must advance four requirements to be considered a claim of actual innocence. First, the evidence in support

of the claim must be newly discovered *People v. Edwards*, 2012 IL 111711, ¶ 32. “Newly discovered” means that the evidence was unavailable at the time of the trial and could not have been discovered earlier through due diligence *People v. Harris*, 206 Ill.2d 293, 301 (2002). Second, the newly discovered evidence must be material and not merely cumulative. *Edwards*, 2012 IL 111711, ¶ 32. Third, a petitioner’s newly discovered evidence must be so conclusive that “it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt.” *People v. Sanders*, 2016 IL 118123 ¶ 47, citing *Edwards*, 2012 IL 111711, ¶ 40. That is to say, “A claim of actual innocence is not a challenge to whether a petitioner had been proven guilty beyond a reasonable doubt, but rather an assertion of total vindication or exoneration.” *People v. House*, 2015 IL App (1st) 110580, ¶41, citing *People v. Barnslater*, 373 Ill. App. 3d 512, 520 (1st Dist., 2007). When evidence merely impeaches or contradicts evidenced that was adduced at trial, it is not typically of such conclusive character as to justify postconviction relief. *People v. Collier*, 387 Ill. App. 3d 630, 636–37 (1st Dist., 2008). The conclusiveness of the new evidence is the most important element of an actual innocence claim. *Sanders* 2016 IL 118123, ¶ 47, citing *People v. Washington*, 171 Ill.2d 475, 489 (1996).

62. Regarding what constitutes “newly” discovered evidence, if the evidence was available prior to trial or at a prior posttrial proceeding, the evidence is not newly discovered. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21. Evidence is also not newly discovered when it presents facts already known to a petitioner prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative *Barnslater*, 373 Ill.App.3d at 523-524. “It is the facts comprising that evidence which must be new and undiscovered.” *Id.* Consequently, evidence

that “does not contain any facts that defendant would not have known at or prior to his trial” is not newly discovered. *People v. Davis*, 382 Ill.App.3d 701, 712 (2nd Dist., 2008).

63. Regarding the requirement that the newly discovered evidence could not have been discovered prior to trial with the exercise of due diligence, our courts have long held that an expert’s conclusions that do not rest on any evidence that was unavailable before trial simply do not constitute “new” evidence. *People v. Patterson*, 192 Ill.2d 93, 140 (2000); *see also People v. Hauad*, 2016 IL App (1st) 150583 ¶ 54-55 (a new assessment of previously available evidence does not constitute newly discovered evidence).
64. Finally, the Illinois Supreme Court’s opinion in *Sanders* is particularly instructive on what constitutes a claim being contradicted or “positively rebutted” by the record. *Id.* at ¶ 48. In *Sanders*, the court first clarified that credibility determinations could not be made by a trial court in Stage 2 post-conviction proceedings, even if the trial court previously made a credibility finding regarding a particular witness in a separate proceeding. *Id.* The court went on to evaluate the affidavits attached to the petition, however, under a Stage 2 analysis, accepting well-plead facts as being true. *Id.* In that case, the petitioner’s affidavits involved a recantation from a witness that testified at the petitioner’s trial. The court focused exclusively on the conclusive character of the evidence, noting that the conclusiveness of the new evidence is the most important element of an actual innocence claims. *Id.* at ¶ 47 *citing People v. Washington*, 71 Ill.2d 475, 489 (1996). The *Sanders* court provided the starkest definition of what the conclusiveness of new evidence means, stating “we must be able to find that petitioner’s new evidence is so conclusive that it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt.” *Id.*

65. The *Sanders* court examined the affidavits presented in that case under that standard. The court noted that the recanting witness affidavit merely added conflicting evidence to the evidence adduced at trial, and the affidavit of an occurrence witness merely contradicted the testimony of other occurrence witnesses who testified at trial and therefore this evidence was not of such conclusive character as would probably change the result on retrial. *Id.* at ¶¶ 48-53.

B. Brady Violations

66. Under the rule announced in *Brady v. Maryland*, 373 U.S. 83 (1963) and subsequently incorporated in Supreme Court Rule 413, the prosecution has the duty to disclose certain exculpatory materials to the defense. A *Brady* claim may arise in the following three circumstances: (1) where previously undisclosed evidence reveals the prosecution introduced trial testimony it knew or should have known was perjured, (2) where the State fails to comply with a defense request for disclosure of some specific exculpatory evidence, and (3) where the State fails to voluntarily give the defense exculpatory evidence never requested or requested only in a general manner. *Kyles v. Whitley*, 514 U.S. 419, 433, (1995). From the principles established under the “*Brady*” rule, “the prosecution has a duty to disclose exculpatory material to the accused upon specific request” and in the absence of a specific request, to disclose only such evidence that is “so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce.” *People v. Salgado*, 263 Ill. App. 3d 238, 250, (2nd Dist., 1994) (citing *People v. Harris*, 129 Ill. 2d 123, 152, (1989) (citing *United States v. Agurs*, 427 U.S. 97, 107, (1976)).

67. Regarding a *Brady* violation for presenting knowingly false testimony, the standard is that, if the prosecution fails to turn over undisclosed evidence that demonstrates that the prosecution's case includes perjured testimony, and that the prosecution knew, or should have known, of the perjury, then there is a "strict standard of materiality" and the conviction must be set aside if any reasonable likelihood exists that the false testimony could have affected the jury's judgment *People v. Coleman*, 183 Ill.2d 366, 391 (1998); quoting *Agurs*, 427 U.S. at 103.
68. To establish a *Brady* violation, regarding "exculpatory evidence," a petition must establish the following: (1) that evidence existed within the State's control that was undisclosed and (2) "the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill.2d 56, 73–74 (2008). Evidence is considered "material" if there is a reasonable probability the result of the proceeding would have been different had the evidence been disclosed. *Beaman*, 229 Ill.2d at 74, (citing *People v. Harris*, 206 Ill.2d 293, 311 (2002)). "To establish materiality, an accused must show 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Beaman*, 229 Ill.2d at 74 (quoting *Coleman*, 183 Ill.2d at 366). Evidence is not material if it is merely cumulative. *Harris*, 206 Ill.2d at 312 (citing *People v. Cloutier*, 191 Ill.2d 392, 400–401 (2000)). Finally, the materiality of the undisclosed evidence must be evaluated by also considering the strength of the evidence presented against the Petitioner at trial. *Beaman*, 229 Ill.2d at 77.
69. As our courts have made clear, the purpose of the *Brady* rule is to ensure that a miscarriage of justice does not occur, "not to displace the adversary system as the primary means by which truth is uncovered." *United States v. Bagley*, 473 U.S. 667, 675, (1985). As a corollary to this

principle, evidence otherwise available to the defense with the exercise of due diligence is not considered “suppressed” or “withheld” for purposes of the Brady rule because it is available to the defense. *See, e.g., Snow*, 2012 IL App (4th) 110415, ¶ 39, *People v. Doyle*, 328 Ill.App.3d 1, 6–7 (1st Dist., 2002) (finding no *Brady* violation where the defendant was aware of the evidence before trial); *People v. Ramsey*, 147 Ill.App.3d 1084, 1091 (4th Dist., 1986) (finding no *Brady* violation where the defendant knew about the evidence but did not request testing); *see also People v. Smith*, 46 Ill.2d 430, 432-33 (1970) (holding that disclosing the existence of evidence provided the defendant with the right and opportunity had he desired to do so to demand that the evidence be produced).

C. Ineffective Assistance of Counsel claims

70. To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two prongs of the Strickland test: deficiency and prejudice. *People v. Griffin*, 178 Ill. 2d 65, 73 (1997). Deficiency means the error committed by trial counsel was so grievous that trial counsel ceased operating as “counsel” guaranteed by the sixth amendment. *People v. Coleman*, 168 Ill. 2d 509, 528 (1995). To establish prejudice, a defendant must show the error was “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* Every defendant must make a showing as to both deficiency and prejudice, but if a court finds no prejudice then it does not need to decide whether counsel’s performance was constitutionally deficient. *People v. Mahaffey*, 165 Ill. 2d 445, 458 (1995). A trial counsel’s decision to call a witness to testify is “within the realm of strategic choices that are generally not subject to attack on the grounds of ineffectiveness of counsel.” *People v. King*, 316 Ill. App 3d 901, 913 (2000).

Failure to present of witnesses who would present contradictions on key facts and undermine an otherwise consistent trial strategy will not render a, trial counsel's strategy "irrational and unreasonable in light of the circumstances that defense counsel confronted at the time." See *People v. Faulkner*, 292 Ill. App. 3d 391, 394 (1997).

D. Partial Dismissal of Post-Conviction Claims

71. Unlike claims presented in a post-conviction petition at the first stage of proceedings, the trial court may partially dismiss claims within a petition that do not meet the legal requirements at the second stage of proceedings. *People v. Lara*, 317 Ill.App.3d 905, 908. (3rd Dist., 2000); *People v. Mitchell*, 2012 IL App (1st) ¶72; see, also *Coleman*, 183 Ill. 2d at 378 (supreme court allowed only some of the claims to proceed to an evidentiary hearing and affirmed the dismissal of the remaining claim). Partial dismissal is particularly applicable where clearly meritless claims accompany claims that require an evidentiary hearing. See *People v. Logan*, 2011 IL App (1st) 093582 ¶58.

V. ANALYSIS

1. CLAIMS NOT INVOLVING "ACTUAL INNOCENCE" ARE TIME BARRED

72. As an initial matter, the Defendant's Petition advances constitutional claims that are clearly time-barred. The Defendant sought review in the Illinois Supreme Court, which was denied on May 29, 2013. Thereafter, the Defendant had 90 days to file a writ of *certiorari* with the United States Supreme Court. *People v. Johnson*, 2017 IL 120310, ¶20. This would have been due on August 29, 2013. The Defendant did not file such a writ within this time period. Under Section 122-1(c) of the Post-Conviction Hearing Act, the Defendant then had six months after

the expiration of this 90-day time period to file a post-conviction petition. Since this would have fallen on a weekend, a post-conviction petition as due on Monday March 4, 2014. This would make the instant Petition untimely by five years, six months, and twenty-seven days.

73. The Act does toll the filing deadline for a petition when a petitioner alleges specific facts demonstrating why the untimely filing was not due to the petitioner's culpable negligence. *See* 725 ILCS 5/122-1(c). A petitioner bears the "heavy burden" to affirmatively show within the petition why the tardiness of the petition was not due to his culpable negligence. *People v. Gunartt*, 327 Ill.App.3d 550, 552 (1st Dist., 2002). Our courts have defined culpable negligence as "negligent conduct that, while not intentional involves a disregard of the consequences likely to result from one's actions." *Rissley*, 206 Ill.2d at 420. While length of the delay, although not dispositive, is a factor the court may consider when determining whether the Defendant was culpably negligent for failing to comply with the time limitations of the Act. *People v. Stoecker*, 384 Ill.App.3d 289, 292 (3rd Dist., 2008); *see also People v. Hampton*, 349 Ill.App.3d 824, 828 (2nd Dist., 2004) ("it stands to reason that a defendant who waits nearly five years beyond the statutory deadline to file a petition has more explaining to do than one who is late by less than a week.").

74. Defendant's Petition does not appear to address or even acknowledge this default or provide any specific facts demonstrating why she is not culpably negligent for the extraordinary delay in advancing her petition. To the contrary, while the record demonstrates that the court was granting orders for DNA testing of trial exhibits and review of trial evidence as far back as 2014, a review of the exhibits attached to Defendant's Petition reveals that much of the work on the Defendant's Petition appears to have been done within the last six to ten months.

75. The Defendant now alleges multiple claims of Ineffective Assistance of Counsel and *Brady*, violations throughout her Petition. These claims were available to the Defendant immediately after her trial as they all involve matters within the record. As the record indicates, however, the Defendant was simply in no hurry to bring these claims forward. Instead, they are all bootstrapped along an actual innocence claim some five years after they are time-barred.
76. The Act's time limitation for filing a post-conviction petition is not merely a technicality. Rather, it plays an important role in fundamental fairness. As the court is aware, criminal cases simply do not get better with age. Investigating the merits of claims regarding matters that were alleged to have occurred over a decade ago presents a unique challenge, particularly when those matters involve facts that would have been known to a petitioner at the time of trial. Years later, evidence or witnesses that would have at one time been easily available to refute an otherwise meritless claim may no longer exist. For this reason, and particularly because of the extraordinary delay of the issues raised in this Petition, the People seek partial dismissal of the constitutional claims that are not free-standing claims of actual innocence.
77. The People recognize that the Defendant's claims of actual innocence would obviously not be time-barred. *See* 725 ILCS 5/122-1(c) ("this limitation does not apply to a petition advancing a claim of actual innocence."). The various other claims of constitutional violations alleged throughout the Petition, are however clearly defaulted and should therefore be dismissed. The Defendant's Petition clearly uses the vehicle of "actual innocence" to put forward other alleged claims of deprivations of her constitutional rights at trial that are well divorced from any claim of actual innocence. As the Petition clearly demonstrates, Defendant attempts to boot-strap upon her actual innocence claim several other claims of Ineffective Assistance of Trial Counsel

(Petition, para. 8, 16, 17, 27, 129-131), claims of violating disclosure duties pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) (i.e. “*Brady* violations”) (Petition, para. 63, 125, 131, 133, 155), claims of *Brady* violations by knowing use of false/perjured testimony (Petition, para. 127-128, 133-134, 151, 157), and claims that appear to be no more than attacking the sufficiency of the evidence adduced at trial (Petition, para. 136-158). Partial dismissal of these claims is warranted as they are time-barred with no showing that the Defendant was not culpably negligent for failing to bring these claims with the Act’s time limitations for such claims.

2. THE PETITION DOES NOT ADVANCE A “FREE-STANDING” CLAIM OF ACTUAL INNOCENCE

78. Contrary to Defendant’s claim at paragraph 123 of her Petition, the Defendant’s Petition also does not advance a “free-standing claim of actual innocence.” (Petition, para. 123). The Illinois Supreme Court has long held that a post-conviction petition could be used to as a vehicle to advance a *free-standing* claim of actual innocence based upon newly discovered evidence. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). The Supreme court has also made clear, however, that a free-standing claim of innocence means that the newly discovered evidence being relied upon is not being used to supplement an assertion of a constitutional violation with respect to the trial. *People v. Hopley*, 182 Ill.2d 404, 4443-44 (1998).

79. In *Hopley*, the defendant was convicted at trial and later filed a postconviction petition alleging, in part that he was actually innocent based upon several affidavits attached to the petition. *Id.* However, the defendant also relied upon those same affidavits in support of his claim that prosecutors had committed *Brady* violations, and his claim that police officers had coerced his

confession. *Hobley*, 182 Ill.2d at 444. The *Hobley* Court that the defendant had not properly raised a free-standing claim of innocence because the affidavits he cited were also used to supplement separate assertions of constitutional violations. *Id.* Consequently, it held that he was not entitled to an evidentiary hearing on his innocence claims. *Id.*

80. Relying upon *Hobley*, the Supreme Court again ruled that a petitioner was not allowed to use the same evidence to supplement claims of both actual innocence and other constitutional claims in *People v. Orange*, 195 Ill.2d 437, 459. In *Orange*, the petitioner's claim of actual innocence relied upon various documents alleging he was coerced into confessing by police. *Id.* at 446–47. The petitioner used the same documents to argue that his trial was unconstitutional because his confession was involuntary. *Id.* at 459. The supreme court, again quoting *Hobley* and *Washington* ruled that defendant was not entitled to an evidentiary hearing on his innocence claims because his evidence was “used to supplement an assertion of a constitutional violation with respect to [the] trial,” and thus his innocence claim was not free-standing . *Orange*, 195 Ill.2d at 459, quoting *Hobley*, 182 Ill.2d at 443–44, quoting *Washington*, 171 Ill.2d at 479.

81. Since *Orange*, *Hobley*, and *Washington*, our appellate courts have continued to hold that a defendant cannot bring a postconviction claim of actual innocence where it is not free-standing. See, e.g., *People v. Brown*, 371 Ill.App.3d 972, 984 (1st Dist., 2007); *Collier*, 387 Ill.App.3d at 637. Relying on the above precedent from the Supreme Court, the appellate court in *Brown* explained that an innocence claim is not free-standing where its evidentiary support is also used to support separate claims. 371 Ill.App.3d at. (“[Affidavit] cannot also be used to support a free-standing claim of actual innocence” where “it is being used by defendant to assert

ineffective assistance of counsel claims with respect to his trial”); *see also Collier*, 387 Ill.App.3d at 637 (“Freestanding claims of innocence contemplate that the newly discovered evidence is not also being used to supplement the assertion of another constitutional violation.”). As our appellate courts have explained, the rationale for this requirement is because the purpose behind claims of actual innocence is entirely different from claims of other constitutional violations. An actual innocence claim is meant to support a “total vindication or exoneration, not merely present a reasonable doubt.” *Adams*, 2013 IL App (1st) 111081, ¶ 36. Other constitutional claims, such as ineffective assistance of counsel, or *Brady* violations would not bring “total vindication or exoneration” as an actual innocence claim requires. *Id.*

82. Turning to the contents of the Defendant’s Petition, it is clear the Petition is not a free-standing assertion of actual innocence. Quite the contrary. The claims of actual innocence are hopelessly intertwined with various other claims. Paragraph 121 of the Petition specifically incorporates all the earlier assertions in her claim of actual innocence, Paragraph 127 again incorporates all the actual innocence arguments into arguments of coerced testimony, Paragraph 129 all of the earlier assertions for claims of ineffective assistance of counsel, Paragraph 132 re-alleges all the proceeding section now alleging a Due Process (*Brady*), violation, and Paragraph 137, a paragraph that only contains the singular word “Reincorp” presumably was yet another attempt to re-incorporate the same evidence now packaged in this section to advance a generalized complaint as to the sufficiency of the evidence at trial.

**3. THE PETITION ADVANCES NUMEROUS CLAIMS THAT ARE BARRED BY
RES JUDICATA AND FORFEITURE**

83. The claims found at paragraphs 8, 15-17, 27, 29, 39-42, 45, 52, 63, 80, 83, 84-86, 96, 98, 125, 127-128, 130, 131, 132-135 and 136-160 contains claims regarding information that was available to the Defendant and either was or could have been raised on her direct appeal. The claims advanced in these paragraphs involve ineffective assistance of counsel, prosecutorial misconduct, and attacks on the sufficiency of the evidence. These claims are based upon information already contained within the record and therefore are barred by the principles of *res judicata* and forfeiture. The People move that the claims made at these paragraphs be denied on that basis. *Tenner*, 206 Ill.2d at 392.

**4. THE PETITION IS UNVERIFIED AND IS SUPPORTED BY NUMEROUS
UNSWORN/UNNOTARIZED STATEMENTS**

84. The Defendant's statement is unsworn to as it lacks a notarized verification affidavit as is required by Section 122-1 of the Act. The purpose of this requirement is to ensure the Petition is brought "truthfully and in good faith." *Allen*, 2015 IL 113135, ¶ 27. (Internal quotation marks omitted.) As the Petition lacks this verification and the People have serious concerns about whether it was brought "truthfully and in good faith," the People move to dismiss the Petition on that basis. *Allen*, 2015 IL 113135, ¶ 27. (Internal quotation marks omitted.).

85. Additionally, much of the "evidence" in support of the Defendant's Petition consists of statements purporting to be expert reports, statements purporting to be written interviews of witnesses, or statements purporting to be affidavits that are not notarized or sworn to. At the

second stage of post-conviction proceedings, the People may challenge reliance upon these unsworn statements as they do not comply with Section 122-2 of the Act. *Allen*, 2015 IL 113135, ¶ 34-35; *Velasco*, 2018 IL App (1st) 161683 ¶¶98-104 The Defendant may not carry her burden of establishing a substantial violation of her constitutional rights based upon these unsworn/unnotarized documents and dismissal of those claims that rely upon unsworn statements is appropriate. *Allen*, 2015 IL 113135, ¶ 34-35, *Spivey*, 2017 IL App (2d) 140941, ¶ 17; *Velasco*, 2018 IL App (1st) 161683 ¶¶98-104. Specifically, the People challenge the statements contained in Exhibits 3, 4, 5, 7, 10, 11, 12, 16, 19, 21, 26 (the Lee McCord statement and both statements of Larry and Francine Merar), 27, 29, 35, 36, 40, 41, 42a, 43, 44 as well as the supplemental Exhibits filed on November 14, 2019 containing statements of Perry Meyer and John Larsen. These documents are all unsworn and unnotarized affidavits/statements that do not comport with Section 122-2 of the Act and therefore the court should not consider in evaluating the Defendant's Petition at this stage of the proceedings. *Allen*, 2015 IL 113135, ¶ 34-35, *Spivey*, 2017 IL App (2d) 140941, ¶ 17; *Velasco*, 2018 IL App (1st) 161683 ¶¶98-104.

5. CLAIMS NOT SUPPORTED BY THE RECORD OR ACCOMPANYING EXHIBITS

86. Several paragraphs in the Defendant's Petition contain factual assertions that are not found in the record of proceedings and are not supported by any of the Exhibits attached to the Petition. At the second stage of proceedings, allegations within the Petition must be supported by the record or accompanying affidavits. *Coleman*, 183 Ill.2d at 381. In this case, the allegations

contained in paragraphs 4, 6-9, 15-17, 21, 32, 41, 42, 45, 48, 52, 53, 54, 58, 59, 61, 63, 66, 72, 73, 83, 86, 89, 96, 98, 100, 104, 111, 113, 114, 115, 117, 125, 131, 140, 141, and paragraphs 149-158 appear to be supported by nothing enclosed within the Petition but the author's own "say so." These allegations do not appear to reference or refer to the actual evidence contained within the attached Exhibits or refer to clear portions within the record that support the allegations. The People therefore object to the unsupported allegations found at these paragraphs and move that they not be considered in the court's analysis of the legal sufficiency of the Defendant's Petition.

6. CLAIMS REGARDING DNA FOUND ON LIVE ROUNDS

87. Found at paragraphs 13, 36, and 126 of the Defendant's Petition, the Defendant claims her actual innocence due to post-trial DNA testing she had conducted of the live rounds found at the crime scene that were admitted at her trial. As a threshold matter, Defendant describes this DNA testing as being possible now due to "recent developments in DNA technology." (Petition, para. 13). The Defendant offers no explanation on what these "recent developments" were between 2011 and 2018 or why these bullets couldn't have been (or weren't) tested for DNA prior to her trial. *See Rissley*, 206 Ill.2d at 412. ("nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act."). There is nothing enclosed in the Defendant's Petition or attached exhibits that supports this assertion that this post-trial DNA testing was only possible because of "recent developments in DNA technology." Consequently, if the DNA testing pursued by the Defendant was

available at the time of her trial with the exercise of due diligence, the evidence is not “newly discovered” for purposes of establishing a claim of actual innocence. *Harris*, 206 Ill.2d 293.

88. Turning to Exhibit 3 of Defendant’s Petition, it is evident that the tested bullets were swabbed for touch DNA and were subject to Autosomal and Y-STR DNA analysis. (Petition, Ex. 3). These are not recent developments in DNA testing. Both types of DNA testing were quite available prior to the Defendant’s trial and could have been utilized with the exercise of due diligence. *People v. Zapata*, 2014 IL App (2d) 120825 (2014) ¶13 (noting that autosomal and Y-STR DNA testing procedures had been judicially recognized as generally accepted within the scientific community as far back as 2005). The Defendant’s claimed DNA evidence therefore does not meet the threshold requirement that the evidence would have been available prior to her trial with the exercise of due diligence.

89. Regarding the remaining requirements for this evidence to support the Defendant’s claim of actual innocence, it is apparent from the Defendant’s Petition that this evidence was proffered on two issues relating to Defendant’s actual innocence claim. First, the Defendant argues this DNA evidence from the bullets was relevant because the Defendant’s DNA was not found on the bullets. (Petition, para. 13, 126). Second, the Defendant argues that the DNA evidence found on the live rounds was relevant because DNA from an unidentified male was found on the live rounds. (Petition, para. 36).

90. Assuming this evidence is material and non-cumulative on these issues, the evidence is hardly so conclusive such that it is more likely than not that no reasonable jury would find the Defendant guilty beyond a reasonable doubt, particularly given the overwhelming evidence of the Defendant’s guilt. *See Sanders* 2016 IL 118123, ¶ 47. This evidence is largely akin to the

“unidentified fingerprint” evidence that the defense admitted by stipulation at the Defendant’s trial. (R.003903). The defense at Defendant’s trial already argued extensively that the live rounds found at the crime scene didn’t have the Defendant’s fingerprints on them, and that an unidentified fingerprint was found on the door to Reuter’s apartment (R.004033). The defense also already argued the point that the Defendant’s own DNA was not found at the crime scene. (R.004033). The defense attempted to argue at trial that this evidence created a reasonable doubt of the Defendant’s guilt. Her jury obviously did not agree. Now, when presented with very similar evidence concerning the unknown DNA found on the live rounds, the standard is even higher – that the evidence is “so conclusive that no reasonable juror would find [the defendant] guilty beyond a reasonable doubt.” *Sanders* 2016 IL 118123, ¶ 47.

91. First, the lack of the Defendant’s DNA on the live rounds is hardly surprising, let alone compelling, especially given that the Defendant herself stated that she took precautions to prevent leaving physical evidence at the crime scene, such as by wearing gloves when she murdered Reuter. (R.003457). It is logical she would have taken similar precautions loading her firearm as well, especially considering the firearm used would have ejected spent shell casings at the crime scene. The evidence established that the Defendant planned this murder for weeks if not months. She surveilled the crime scene in advance. She rented a car. She apparently set out to construct a silencer. She obtained a disposable and, in her mind, untraceable phone. She attempted to establish an alibi. She wore a disguise. She wore gloves. And she disposed of the murder weapon in a bucket of cement. Given this intense level of planning, it would obviously make no sense for the Defendant to litter the crime scene with live rounds covered with her fingerprints or DNA. The fact that the Defendant’s DNA was not

found on the live rounds was consistent with the State's theory that this was a carefully contrived, pre-mediated murder. (R.004058-59).

92. It was also unclear from any evidence presented in the Defendant's Petition whether and to what extent touch DNA would even be expected to be found on live rounds that were loaded into, chambered, extracted, and then ejected through a handgun. (R.003237-38). The Defendant seems to wish the court to assume that this would be a viable location to realistically suspect the "shooter's" DNA to be present, but there is nothing in the exhibits attached to the Petition to support this invited assumption. *See People v. Allen*, 377 Ill.App.3d 938, 944 (1st Dist., 2007) (absence of defendant's DNA on a gun would not exonerate him as it is not conclusive evidence he didn't handle the gun). This is not a situation involving serological evidence such as blood or semen where a suspect's DNA would naturally be expected to be found and therefore if it were not the assumption could be made that this was potentially exonerating. *See People v. Davis*, 2012 IL App (4th) 110305 ¶ 28 (DNA evidence conclusive where the Defendant not the source of serological samples from a sexual assault). There was no evidence presented at all in the Petition or attached exhibits that live rounds of ammunition would be expected to contain DNA from the individual who loaded the firearm versus the individuals who manufactured the live rounds or packaged the live rounds for sale. It is obviously the Defendant's burden of proof to establish this and for purposes of the legal sufficiency of the Petition this is simply not present. *Pendleton*, 223 Ill.2d at 473.

93. Second, regarding the Defendant's allegation that male DNA was discovered on the live rounds, this evidence at first blush appears to be quite persuasive. The Defendant obviously insinuates in her Petition that the presence of male DNA found on the live rounds shows that

the killer of Rhoni Reuter was a male. This insinuation is in turn weaved together with numerous other allegations directed at Shaun Gayle made throughout the Petition, attempting to claim that he in fact murdered Reuter rather than the Defendant. (See Petition, paras. 142, 144-149).

94. The problem with this evidence is that the reliability of the Defendant's post-trial DNA testing of the live rounds is demonstratively refuted by the record. The record, in fact, demonstrates that these live rounds were physically handled by other people both when they were subjected to firearm and toolmark testing and during the Defendant's actual trial. Peter Striupaitis, the firearm and toolmark examiner who examined these live rounds, explained how they were tested. He testified that he visually inspected each of these unfired rounds, handled them, and placed them under a microscope. (R.003289-90). The live rounds in question, People's Exhibits 66-70 were admitted into evidence at the Defendant's trial and are of record. (R.003267-68). As the court recalls and can observe from the exhibits admitted at trial and made part of the record, these live rounds were actually engraved with initials, the lab's item number, and the lab report number after they were tested. (See People's Exhibits 66-70). As Mr. Striupaitis testified, this was how he marked all the items he tested regarding this case with his initials and identifying marks consisting of the lab number and item number. (R.003279).
95. These engravings of lab's item number and lab report number were also observed by the Defendant's investigators when they photographed one of the live rounds admitted at the Defendant's trial during their review of the evidence back in 2018. In Exhibit 43 of the Defendant's Petition, on page 37/130, IMG_0222.JPG (dated March 22, 2018) is a photograph of the live round admitted at trial as People's Exhibit 69. The engravings on the live round

containing the lab's identifying marks are clearly visible. The Defendant's investigators note this in the caption underneath this photograph where it states "cartridge marked 07-4728 #15-01."⁷

96. As the Defendant therefore appears to have known prior to presenting this claim of "unknown male DNA" in her Petition, the live rounds admitted into evidence during her trial were clearly handled by Mr. Striupaitis during his testing. They were even physically engraved upon by him after his testing. Frankly, it is obvious that these live rounds were not preserved for subsequent forensic DNA testing as the Defendant has repeatedly claimed to this court in her motions for post-trial DNA testing.

97. This fact is even more apparent in the transcript of the Defendant's trial where Mr. Striupaitis even opens the box containing the live rounds and handles the live rounds in court while he is testifying. (R.003268-69). The live rounds were physically held out by Mr. Striupaitis and shown for the jury. (R.003268-69). This too, was a tell-tale sign the Defendant was aware that the live rounds were no longer suitable for subsequent DNA testing.

98. Post-trial DNA testing of these live rounds was worthless and it not at all surprising that male DNA would have been found on those live rounds when they were tested by the Defendant's laboratory some seven years after her trial. The fact that these live rounds were handled by the state's firearm examiner was apparent from the trial exhibits, apparent from the Defendant's own exhibits in her Petition, and apparent from the record of trial. All of this would have been

⁷ This "loose 9mm cartridge" photographed in IMG_0222.JPG by the Defendant's investigators is actually the live round missing from the packaging of People's Exhibit 69, which was sent to the Defendant's forensic lab. (See Petition, Exh. 3, pg 1 of 5).

known to the Defendant when she requested DNA testing on these exhibits and when she presented this meritless claim in her Petition.

99. The Defendant's assertions made in her motions for post-trial DNA testing that these live rounds were somehow still suitable for DNA testing after they were subjected to firearm/toolmark testing, admitted as trial exhibits, and handled in open court is troubling. More troubling is the fact that the Defendant fails to acknowledge in her Petition that these live rounds were in fact previously swabbed for and tested for the presence of DNA by the Northeastern Illinois Regional Crime Laboratory back in 2007 prior to the live rounds ever being subjected to firearm/toolmark testing. This obviously would explain the otherwise seemingly haphazard handling of the live rounds by a forensic scientist during this firearm/toolmark testing and during the Defendant's trial. For purposes of this Motion to Dismiss, the court obviously may not consider matters outside the record of proceeding. *People v. Moore*, 189 Ill. 2d 521, 532–33, (2000) (State not permitted to provide affidavits regarding matters outside of the record in support of a Motion to Dismiss). Should this claim advance to an evidentiary hearing, however, the court should take note that the Defendant would have been well-aware that DNA testing of the live rounds in question was previously conducted and that the Defendant did not disclose this material fact in her Petition or in any motion for discovery previously made before this court.

7. CLAIMS REGARDING MEDICAL ALERT BRACELET

100. For similar reasons, the Defendant's claims regarding DNA found on the medical alert bracelet do not meet the criteria of a legally recognized actual innocence claim or warrant post-

conviction relief. Just as with the testing of the live rounds, DNA testing of this item was available at the time of the Defendant's trial and could have been conducted with the exercise of due diligence.

101. The Defendant claims the evidence of DNA testing now conducted on this bracelet is relevant and material to her claim of actual innocence since Rhoni Reuter's DNA was not discovered on the bracelet. Again, this evidence is hardly compelling. The bracelet was not a serological sample such as blood or semen where DNA would be expected to be found. Rhoni Reuter could have owned the bracelet without DNA being found on it 18 months later. *See Allen*, 377 Ill.App.3d at 944 (absence of defendant's DNA on a gun would not exonerate him as it is not conclusive evidence he didn't handle the gun). The Defendant's own statement to Christi Paschen was that she took the bracelet from inside the residence after she murdered Rhoni Reuter and not directly off Reuter's body. (R.003382-83). The bracelet was then buried in the ground for approximately 18 months until it was found by the police. (R.003565-67).

102. The lack of evidence of Reuter's DNA on the bracelet is also largely cumulative to evidence the jury already considered. The defense admitted evidence by stipulation at trial that Shaun Gayle, Wayne Reuter, and several other associates of Rhoni Reuter could not recall Rhoni Reuter wearing such a bracelet. (R.003902). The lack of Reuter's DNA being on the bracelet merely advanced this same argument, though in a less persuasive fashion.

103. This lack of DNA evidence is again not so conclusive, such that it is more likely than not that no reasonable jury would find the Defendant guilty beyond a reasonable doubt. *See Sanders* 2016 IL 118123, ¶ 47. It merely adds conflicting evidence to the evidence adduced at trial and is therefore not of a conclusive character. *See Sanders* 2016 IL 118123, ¶ 52. This is

particularly clear given the overwhelming evidence of the Defendant's guilt. *Yang*, 2013 IL App (2d) 110542-U, ¶80. This medical alert bracelet was relevant as one the testimony of Christi Paschen was corroborated. Prior to the bracelet being found, Paschen gave a statement to police about the Defendant telling her she took something from Rhoni Reuter's apartment. (R.003382-83). Paschen described what the Defendant said she took as a medical alert bracelet. (R.003382-83). When Paschen subsequently led police to the spot at the Meridian Banquet Hall where a medical alert bracelet was found, this was one of the many details of Paschen's account that was corroborated by the evidence. As indicated more fully below, Paschen's statements to police were corroborated in multiple respects, chief among them the Defendant's own words on recorded conversations at the Denny's Restaurant, as well as the Enterprise Rental Car records the Defendant has completely ignored throughout her Petition. The Defendant's challenge to the ownership of the medical alert bracelet, does little to advance her claim of innocence.

104. The Defendant's remaining claims regarding the bracelet, found at paragraphs 47-48 of the Defendant's Petition, insinuate that the bracelet evidence was somehow fabricated. In all these claims, the Defendant repeatedly mischaracterizes the evidence.

105. At paragraph 47 of the Petition, Defendant claims Rhoni Reuter's family and friends said "No, Rhoni did not have such a bracelet." The Defendant uses this exact quote and refers to Exhibit 18 of her Petition. Exhibit 18 is a police report from Investigator Scott Frost who contacted family members regarding this bracelet. None of these friends and family members recognized this bracelet or knew if Rhoni Reuter owned a metal alert bracelet. None of them

used the quote the Defendant fabricates that “*Rhoni did not have such a bracelet.*” (Petition, para. 48). None of the family members are quoted at all in the report attached to this exhibit.

106. Additionally, this claim regurgitates and mischaracterizes the evidence adduced at trial. Defendant’s Stipulation 10 was that Investigator Frost made phone calls to Shaun Gayle, Wayne Reuter, and several associates of Rhoni Reuter asking them if they *remember* her wearing a medic alert bracelet made of white pearls with an inscription that read “pregnant” and none of them *recalled seeing her* wearing such a bracelet. (R.003901-02) (emphasis added). This is quite different than what the Defendant now claims the evidence shows.

107. The Defendant also mischaracterizes how the bracelet was found. In paragraph 48 of her Petition, she states that the bracelet was found in “pristine condition” “lying on top of the ground.” The Defendant offers no evidence of these assertions. These assertions are also contradicted by the record. Officer Chris Fry testified how the bracelet was found buried in the ground after an extensive search that involved the use of medical detectors and then digging in the ground with his hands after the metal detectors detected something. (R.003564-79). The bracelet still appeared to have dirt on it when it was displayed during the trial. (R.003577).

108. More importantly, regarding both of the claims found at paragraphs 47 and 48 of the Defendant’s Petition, this is not newly discovered evidence such that could legally support the Defendant’s claim of actual innocence. This is rather a regurgitation and mischaracterization of the evidence and arguments adduced at the Defendant’s trial. These claims should therefore be dismissed.

8. CLAIMS REGARDING GAS STATION SURVEILLANCE VIDEO

109. The Defendant raises a claim of her actual innocence disputing gas station surveillance video admitted that was claimed to show a black Volkswagen Rabbit in the vicinity of Reuter's apartment during the time of her murder. This claim is found at paragraphs 14 and 17-20 of the Defendant's Petition. Furthermore, at paragraph 131 the Defendant alleges ineffective assistance of counsel regarding this surveillance video and at paragraph 151 the Defendant alleges a *Brady* violation regarding "fabricated" evidence regarding this video.
110. The "evidence" relied upon in the Defendant's Petition disputing this video surveillance comes in the form of the Defendant's retained experts who apparently conducted a "forensic video analysis" of the existing video surveillance footage obtained by the Deerfield Police Department. (Petition, Exhs. 4 and 5). The Defendant's first expert, Arthur Borchers lists his conclusions regarding this "forensic video analysis" at Page 19 of 39 to Page 20 of 39. (Petition, Exh. 4). In these conclusions, the expert states that, in summary, in his opinion the distance is too far, and the gas station video is of insufficient quality to make an identification of the rental car, and that he didn't believe the footage shown to the jury was of a black Volkswagen rabbit. (Petition, Exh. 4, Page 19 of 39). The expert also opines that the video display time is 9 minutes off based upon what he believes to be the "Deerfield Fire Department" response to the crime scene, which is what he believes is also depicted in the video. (Petition, Exh. 4, Page 19 of 39). Finally, this expert offers ancillary opinions such as "the chain of custody of the video is open to question based on the trial record and the evidence of packaging compounded by the lack of police reports" the lack of "foundation in the trial record as to the training, qualifications and experience" of the detective who viewed the video

to conduct “forensic video analysis” as well as commentary on the credibility of the detective claiming he was biased by characterizing the vehicle in the video as appearing to be speeding. (Petition, Exh. 4, Page 19 of 39 to Page 20 of 39).

111. The Defendant’s second expert, Michael Primeau from “Primeau Forensics” offers similar opinions in his report, found at Exhibit 5. In his report, he offers the opinion that the method used to identify the suspect vehicle in the surveillance video (watching it) was not accurate nor acceptable in the scientific community. (Petition, Exh. 5, pg. 26). He offers an opinion that the vehicle depicted in one of the still shot images from the surveillance video does not contain the necessary criteria to make an accurate identification of the suspect vehicle as a Volkswagen Rabbit. (Petition, Exh. 5, pg. 26). The expert then offers an opinion that the vehicle depicted in the other still shot from the surveillance video does not show a Volkswagen Rabbit. (Petition, Exh. 5, pg. 26).

112. There are several glaring problems with these experts’ opinion. First, these proffered expert opinions are not newly discovered evidence that was unavailable prior to the Defendant’s trial with the exercise of due diligence. As stated above, an expert’s conclusions that do not rest on any evidence that was unavailable before trial simply do not constitute “new” evidence. *Patterson*, 192 Ill.2d at 140; *see also Hauad*, 2016 IL App (1st) 150583 ¶¶ 54-55 (a new assessment of previously available evidence does not constitute newly discovered evidence). Since this claimed “evidence” is nothing more than experts going back and reviewing or “forensically analyzing” evidence that was previously available to the Defendant prior to her trial, this so-called “evidence” cannot legally support her claim of actual innocence. *Patterson*, 192 Ill.2d at 140.

113. Second, these expert opinions are also cumulative to arguments already given to the jury at the Defendant's trial. The Defendant's trial counsel advanced this same argument to the jury that the vehicle depicted in the surveillance video was not a black Volkswagen Rabbit. (R.004031-32). This information was well within the ken and common understanding of the jury. The Defendant's expert "opinions" do nothing to alter that.
114. Defendant proffers in her Petition that this "forensic video analysis" determined that the vehicle was not the black rental car in question with a "reasonable degree of forensic certainty" (Petition, para. 20). But that is simply not what the actual expert opinions say. Exhibit 4 of the Defendant's Petition, the expert's report makes clear that all this expert did was attempt to enhance the video footage and then offer his own opinion that the video quality was insufficient to identify the vehicle in question as a Volkswagen Rabbit. (Petition, Exh. 4, pg. 19 of 39). The expert in Exhibit 5 makes this same conclusion regarding one of the video still shots, but concludes the other still shot does not show a Volkswagen Rabbit. (Petition, Exh. 5, pg. 26).
115. The expert in Exhibit 4 then goes on to offer generalized opinions on the chain of custody of the video, the credibility of one of the police officers who testified, and his opinion regarding the time being inaccurate on the video based on his speculation that emergency response vehicles driving by were dispatched for this case and the speed of travel and dispatch time would take them by the gas station at the time he estimates. (Petition, Exh. 4, pg. 19 of 39).
116. Regarding all of these expert opinions on the identification of the suspect vehicle, it is unlikely such opinions would even be permissible at trial since these are all matters well within the understanding of the jury. *See People v. King*, 2020 IL 123926 ¶¶ 38 (an expert's opinion is not admissible on matters that are within the common understanding of ordinary jurors).

Even assuming such opinions would be admissible, since they concern matters well within the understanding of the common juror and they duplicate arguments that were already advanced by the defense at trial, the jury was free to accept or reject these arguments. *King*, 2020 IL 123926 ¶¶ 38. Slapping the labels of “reasonable degree of forensic certainty” or “reasonable degree of scientific certainty” on these opinions adds nothing to them.

117. These expert opinions found in Exhibits 4 and 5 of the Defendant’s Petition are also not so conclusive such that it is more likely than not that no reasonable jury would find the Defendant guilty beyond a reasonable doubt. *See Sanders* 2016 IL 118123, ¶ 47. As stated above, assuming the experts’ opinions would be admissible in a trial, this “evidence” again are opinions a jury would be free to accept or reject as they would be tasked with making the ultimate determination whether the surveillance video supported the State’s case or not. At best, these opinions would add conflicting evidence to that adduced at trial but would not be of such conclusive character that no reasonable jury would find the Defendant guilty beyond a reasonable doubt, particularly given the nature of this evidence and the other overwhelming evidence of the Defendant’s guilt. *See Sanders* 2016 IL 118123, ¶ 47.

118. These expert opinions are also not conclusive evidence in that they do nothing to exonerate the Defendant in any way. *Collier*, 387 Ill. App. 3d at 636–37. These opinions at best attempt to challenge the sufficiency of the evidence adduced at trial, but certainly these expert opinions regarding the gas station surveillance video do not demonstrate that the Defendant is innocent of murdering Rhoni Reuter. *See Adams*, 2013 IL App (1st) 111081, ¶ 36. The overwhelming evidence of the Defendant’s guilt loses very little if anything based upon this gas station video.

119. Regarding the claim of ineffective assistance of counsel found at paragraph 131 of the Petition concerning the video surveillance, this claim also fails. Obviously, this claim would be time-barred. This claim is also forfeited because it could have been raised by the Defendant in her appeal. Additionally, the decision on whether to stipulate to the admission of evidence is one of trial strategy that is typically immune from a claim of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill.2d 302, 324 (2010). That is particularly true in situations such as this when the Defendant herself agreed to and signed all the stipulations, including Exhibit 251, the stipulation to the Shell Gas Station Video. *Id.* at 323-324.

120. Contrary to Defendant's assertion, the Defendant's lawyers did not fail to "adversarial challenge the gas station video tape" by stipulating to its admission. (Petition, para. 131). This assertion is contradicted by the record. As stated above, the defense position was that the vehicle in the video was not a black Volkswagen Rabbit, and that argument was made to the jury. (R.004031-32). The defense also tested the State's theory that the black vehicle in the surveillance video was a Volkswagen Rabbit on cross examination. (R.003774-76). The defense merely stipulated to the admission of the video, not that the vehicle depicted was a Volkswagen Rabbit. The Defendant's Petition can articulate no prejudice in this. Even the report of the Defendant's expert and his opinions regarding the chain of custody of this video would not have affected this video's admissibility. *See People v. Taylor*, 2011 IL 110067 ¶ 41 (gaps in the chain of custody regarding surveillance video go to the weight of the evidence not its admissibility).

121. Finally, the Defendant's claim at paragraph 151 of her Petition that the prosecution "fabricated a story of the Shell gas station video" is meritless. The Defendant offers no

evidence in support of this assertion that the prosecution “fabricated a story” of the Shell gas station video. The Defendant rather appears to suggest that since she has retained experts who have offered opinions that the gas station video does not depict the rental car in question, that the State’s theory regarding this video was somehow “fabricated.” This is not evidence of “fabrication.” This argument amounts to no more than rhetorical fluff. *See Rissley*, 206 Ill.2d at 412 (“nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act.”). This claim is therefore properly denied.

9. CLAIMS REGARDING “UNIDENTIFIED BLACK MALE SUBJECT” AND ALIBI OF SHAUN GAYLE

122. The Defendant makes several claims within her Petition concerning the eyewitness testimony regarding the “male black subject” that was observed in the vicinity of Rhoni Reuter’s apartment near the time of her murder. The Defendant attempts to weave these claims into claims involving Shaun Gayle. These claims are found throughout her Petition at paragraphs 11 and 147 as well as 141-149. These claims are not alleging any “newly discovered evidence” since they all involve information contained within the record. The Defendant regurgitates the same claims that the court considered several times during these proceedings. (R.004169-72). The regurgitation of these claims in this Petition appears to be an attempted re-branding of the facts in this case and particularly an insinuation that Shaun Gayle committed the murder of Rhoni Reuter. Since these claims are all contradicted by the record, they will be taken in turn.

123. At paragraph 11 of the Petition the Defendant starts by claiming “[e]ye witnesses reported to the police that they saw a tall black male subject ‘walking at a fast pace southbound across the lawn’ near Ms. Reuter’s building at the time of the shooting.” (Petition, para. 11). This claim is repeated at paragraph 147 of the Petition where Defendant alleges “[o]ccurrence witnesses reported a tall black man in the area of the Reuter condo building.” (Petition, para. 147). This same paragraph 147 of the Petition then goes on to state that Shaun Gayle had no alibi at the time of the shooting.

124. In support of this claim regarding the “tall black male” the Defendant refers to in paragraphs 11 and 147 of their Petition, the Defendant cites Exhibit 1 of her Petition, which is an exhibit consisting of two police reports. The first is a police report of Investigator Burke dated October 29, 2007 summarizing an interview with eyewitness Manda Hussain (maiden name Cameron) that occurred on October 4, 2007. This police report documents a description Hussain gave of the suspicious subject she saw on October 4, 2007. In that report, the investigator states that Hussain described the suspect as “short, approximately 5’7” to 5’8” tall” with “gold in color glitter on the neck area up to the face” and was wearing a “costume-style wig” and a “dark in color, short, curly wig” and a “dark in color (almost purplish) full-length velour-type sweat suit.” (Petition, Exh. 1, Page 1 of 3).

125. Exhibit 1 of the Defendant’s Petition also includes an investigative report of Detective Mazariegos dated January 8, 2008 that documents an interview with Manda Hussain on January 1, 2008. During this interview, Hussain described the suspect who she saw as “being between 5’0” and 5’4” in height,” who was “thin,” and who was wearing a sweat suit that was “oversized and too big for the person wearing it.” (Petition, Exh. 1, Page 1 of 1). She stated

that the person's face had some sort of paint or makeup on it because "she saw gold glitter sparking on the subject's face." (Petition, Exh. 1, Page 1 of 1). Hussain was shown a photograph of the Defendant and stated that the "jaw line, neck, and tight skin" of the person she observed looked the same as that of the Defendant. (Petition, Exh. 1, Page 1 of 1). She stated that what drew her attention to this person was the wig and the costume and thought it looked like "a high school homecoming costume" since it was too early for Halloween. (Petition, Exh. 1, Page 1 of 1). Finally, Hussain said that she observed the subject "moving at a fast pace and skipping every other step as the subject went up the stair" towards Reuter's apartment.

126. All of these prior descriptions contained in the police reports were stipulated to by the parties and read to the jury for their consideration as Defendant's Exhibit 9. (R.003900-01). They are in short, nothing new.

127. Contrary to Defendant's assertion, Manda Hussain never described this person as "a *tall* black male subject" at all -- even in the exhibits the Defendant refers to in her Petition. This eyewitness's description of the subject she saw as well as her prior statements to the police were also thoroughly explored at trial. (R.003609-39). When questioned about the initial report and the height of 5'7" to 5'8," Hussain stated that those numbers were wrong, and she had described the subject as shorter than that. (R.003632). Hussain described her own height as 5 feet tall. (R.003626). Hussain also stated that she always described the sweat suit as "dark" not "purplish" and that she had always said the subject she saw had make up or face paint because it had gold glitter in it and she thought it was a Homecoming costume. (R.003632-34).

128. In addition to the description provided of the suspect by Manda Hussain, Peter Cowles provided a similar description of the suspect. (R.002368-400). Cowles described this suspect, based upon his build, physical characteristics, height, and weight, to appear to look like a 12 to 13-year-old boy with black hair that appeared to be pinned up, and who ran up to a black sedan parked next to the underground parking garage. (R.002371-85).
129. Based on these descriptions, there was no way the suspect these two witnesses described was Shaun Gayle as the Defendant now insinuates. Any such implication was thoroughly rejected. The Defendant's trial counsel even discounted any argument that they were attempting to claim the person described by Manda Hussain or Peter Cowles was Shaun Gayle. As defense counsel put it, "Mr. Gayle could not possibly be five-foot-tall or whatever or 13 years old." (R.002838). The defense also conceded that Mr. Gayle would be "much bigger" and have "a much different build" than the 12 to 14-year-old that Peter Cowles described in his testimony. (R.002761). Both counsels agreed that Mr. Gayle would not be confused with a 12-year-old boy and the defense stated directly that they were not arguing that. (R.002761-62).
130. Regarding the Defendant's claims that Shaun Gayle provided "inconsistent stories" of his whereabouts, which is found at paragraph 141 of the Petition, the Defendant refers to Exhibit 48, of the Petition. This exhibit contains the police reports of Detective Filenko and police the report of Detective Frost, documenting their interview with Shaun Gayle on October 4, 2007. The exhibit includes a document entitled "Shaun Gayle Timeline from 10/4/2007," which appears to be a typed-up summary comparing the supposed "inconsistencies" from what Shaun Gayle said to Detective Filenko to what he said to Detective Frost. These "inconsistencies" appear to be in the time estimates from when Gayle woke up (9:15 or 9:20 a.m. in Frost's

report vs. around 9:00 a.m. in Filenko's report), the time estimate for when he arrived at the barber shop (approx. 10:15 a.m. in Frost's report and. approx. 10:30 a.m. in Filenko's report), and the sequence of the phone calls Gayle received and made during the time he called the barbershop (Frost has him leaving the barbershop before calling Tom Thayer and Filenko has him receiving that call at the barbershop). These are not true inconsistencies. They are quite minor details that would and should be expected to vary depending on the author of the police report and how the questions are asked during the interview.

131. What is even more obvious from the police reports of Frost and Filenko is that the Defendant encloses in Exhibit 48, is that Frost and Filenko's reports are documenting the *same* interview with Shaun Gayle on October 4, 2007. The Defendant insinuates that Gayle told inconsistent stories to Frost and Filenko, but their reports make clear that both Frost and Filenko are present together at this *same* interview. These "inconsistencies" the Defendant refers to are not inconsistencies in Shaun Gayle's statements. They are inconsistencies in what two officers heard and then wrote down in their reports documenting the same interview with Shaun Gayle. Therefore, Defendant's Exhibit 48 to her Petition offers absolutely nothing to support her claim that Shaun Gayle provided "inconsistent stories of his whereabouts."

132. What this Exhibit does show, however, is how quickly and completely Shaun Gayle cooperated with the police when he learned of Rhoni Reuter's death. As the reports indicate, Gayle contacted the police and learned Reuter had been shot. In his words, he "lost it." (Petition, Exh. 48, pg. 3 of 5). After he learned Reuter had been shot, he drove to the police department and was interviewed by Detectives Frost and Filenko. He provided them a timeline of his activities the night before and day of Reuter's murder. (Petition, Exh. 48, pg. 3 of 5). He

provided consent to search his residence and his vehicle. (Petition, Exh. 48, pg. 4 of 5). He provided consent to submit to a gunshot residue test. (Petition, Exh. 48, pg. 4 of 5). He provided consent to have his firearms taken for testing. (Petition, Exh. 48, pg. 3 of 5). He also provided police with information regarding Monika Krowska, the woman he believed who had been harassing him by accessing his e-mail and sending letters to Rhoni Reuter. (Petition, Exh. 48, pg. 4 of 5).⁸

133. Much of Shaun Gayle's account of how he learned of the murder was contained within the record. The court heard the 911 call where Gayle contacted the police and completely freaked out when he was told Reuter had been shot. (R.002783-85). During the Defendant's trial, the State had this evidence to use in rebuttal should the Defendant attempt to make the claim she advances now – namely that Shaun Gayle reacted "calmly" when he learned Rhoni Reuter had been shot. (Petition, para. 146). As a strategic decision, the Defendant's trial counsel avoided attempting to pose this baseless argument the Defendant now resurrects. (R.002785).

134. In pretrial motions and again during the trial, the court considered the same issues the Defendant now regurgitates at paragraphs 141 to 149 in her Petition regarding Shaun Gayle. (R.001070-79); (R.002734-78). Regarding these claims, the court noted that the defense failed to provide any evidence that Shaun Gayle was involved in the murder in any way. (R.001074). In the Defendant's post-trial motions, the court reiterated that the Defendant was invited to provide proof of Mr. Gayle's complicity in the commission of this particular offense. (R.004169). As the court will note, throughout the Defendant's Petition, the Defendant

⁸ From the search of the Defendant's home, it appears in fact that the Defendant was the sender of these harassing letters, not Monika Krowska. (R.002994-003011). It also appears that the Defendant posed as Monika Krowska to send the harassing e-mails. (R.002918-19).

provides the same “speculation and conjecture” that the court had previously considered. (R.004170). This is also repackaging the same “third-party motive” arguments rejected by the appellate court in the Defendant’s appeal. *Yang*, 2013 IL App (2d) 110542-U ¶ 64-70.

135. The Defendant has done nothing in this Petition beyond regurgitating the same claims verbatim related to Shaun Gayle that were previously considered by this court and the appellate court. These claims are not based upon newly discovered evidence. They were previously considered by this court in its pretrial rulings and previously rejected by the appellate court and are now barred by *res judicata* and forfeiture. The claims are also contradicted by the record. It is clear that the Defendant continues to rehash these salacious claims regarding Shaun Gayle for their sensationalism value in an effort to deflect from her own clear guilt. While such sensationalism has value in selling dramatic novels, it has no place in a court of law.

10. THE CLAIMS REGARDING THE HOMEMADE SILENCER

136. The Defendant makes various claims throughout her Petition that she is actually innocent because of flaws with the evidence admitted against her at trial that she attempted to craft a homemade silencer. These claims are found at 27-31. The Defendant alleges that her trial counsel were ineffective for failing to challenge the assertion that the Defendant made a homemade silencer. These claims are found at paragraphs 17, 27-31. Finally, the Defendant claims a *Brady* violation regarding the evidence concerning the silencer – namely that the prosecution advanced a “patently false narrative” and “made up the idea” regarding the silencer evidence. This claim is found at paragraphs 133 and 153.

137. In support of the Defendant's claims regarding the silencer, she relies upon three exhibits attached to her Petition. Exhibit 9 are photographs taken of the Defendant's home during the execution of a search warrant which show pipes under various sinks within the home and various tools. Exhibit 10 contains the report of Dan Condi, the Defendant's expert who attempted to craft the homemade silencer found in the book the Defendant bought using the same materials in the book she bought. Exhibit 11 is the report of Art Borchers, the Defendant's expert who fired a handgun with and without a silencer to determine whether there were differences.

138. As an initial matter, these proffered expert reports as a matter of law are not newly discovered evidence that may support the Defendant's claim of actual innocence. These are expert conclusions that do not rest on any evidence that was unavailable before trial and therefore do not constitute "new" evidence. *Patterson*, 192 Ill.2d at 140; *see also Hauad*, 2016 IL App (1st) 150583 ¶ 54-55 (a new assessment of previously available evidence does not constitute newly discovered evidence). Like much of the proffered evidence enclosed in the Defendant's petition, these exhibits are nothing more than the opinions of "experts" who go back and examine the evidence that was previously available to the Defendant prior to her trial. As such, these expert opinions cannot support a claim of actual innocence. *Patterson*, 192 Ill.2d at 140.

139. Similarly, the photographs taken of the Defendant's home during the search warrant are also not "newly discovered" evidence and cannot support her claim of actual innocence.

140. Additionally, the evidence presented by the Defendant on this claim is not material and is cumulative to arguments the jury already heard in this case.

141. Turning first to the photographs found in Exhibit 9, these photographs are offered to show “these same items were being used for common home use and repairs.” There is nothing in the attached photographs in Exhibit 9 suggesting the materials purchased by the Defendant from Home Depot on August 4, 2007 were used in the “common home use and repairs” as the Defendant suggests. (R.002624-25). The photographs attached appear to be random photographs of pipes under sinks as well as other photographs of the tools and black sharpie pen described on the list of materials in the homemade silencer book. There is nothing in this exhibit that contradicts the circumstantial evidence that the Defendant purchased a very specific set of materials (screwdriver, keyhole saw, hacksaw blade, drill kit, electrical tape, duct tape, a rubber cup, a large round cup, a sharpie marker, a file, a folding razor, a sink drain, and a clamp) on the same day she received a book on how to make a homemade silencer, which called for those same materials. (R.002625); (R.002696-97). It is self-evident that a book entitled “How To Make a Disposable Silencer” would involve materials one would find in “common home use and repairs” as the Defendant suggests. Indeed, as the book stated, “[t]he construction of these silencers were designed to use a minimum of materials, labor and tools; materials we researched to make the silencer as effective as possible yet easily accessible at any supermarket or hardware store.” (R.002729).

142. Turning next to Exhibit 10, the report of Daniel Conidi, the Defendant asserts that this expert “attempted to fabricate a suppression device that could be attached to the barrel of a Beretta 92FS.” Turning to Exhibit 10, however, the report of this expert does not state that he constructed or attempted to construct the disposable silencer referred to in the book. Instead, the expert states “after trying numerous different ways, I was unable to find a method to attach

a suppression device to this Beretta in a manner that would be practical or usable.” (Petition, Exh. 10). The expert concludes that “[t]here is not enough barrel material extending past the slide that would allow this.” (Petition, Exh. 10).

143. The Defendant’s other expert, Larsen also conducts his analysis from the premise that “prosecutors advanced the theory that during the murder of Rhoni Reuter a ‘silencer’ was affixed to the firearm used.” (Petition, Exh. 11, Page 4 of 33). The expert report again assumes on Page 9 of 33 that the Defendant could not build a homemade silencer for use with the Beretta 92 style pistol “as there is insufficient space at the end of the barrel to attach the device.” (Petition, Exh. 11, Page 9 of 33). This expert opines that anchoring a homemade silencer to the slide or front sight of a Beretta 92 style pistol “would eliminate semi-automatic pistol function and limit potential firing to one round.” (Petition, Exh. 11, Page 17 of 33). He concludes that “there is no forensic evidence to support the theory that a suppressor or ‘silencer’ was used on the firearm that shot Rhoni Reuter on October 4, 2007.”

144. The problem with the opinions provided by both experts is that they work under the assumption that the Defendant would utilize a homemade silencer (suppressor) in such a way as *not* to interfere with the normal operation of the firearm. This assumption is refuted by the record. As the evidence at trial demonstrated, the 9mm handgun used to murder Rhoni Reuter was *not* operating normally. The handgun was clearly malfunctioning as evidenced by the ejection of five live rounds found near the vicinity of Rhoni Reuter’s body. (R.003270-74); (R.003997). Both expert opinions appear to be based upon the premise that the Defendant would have had to affix the homemade silencer to the Beretta, rather than just hold the silencer up to the Beretta’s barrel while she shot Rhoni Reuter. This is an obvious theory that neither

expert appears to have explored or accounted for. It would both explain the witness hearing muffled “pop pop” sounds as well as why the Beretta would malfunction if the Defendant was pressing the pipe silencer too tightly back up against the slide to take the Beretta out of battery and cause a misfire.

145. Most importantly, these expert opinions regarding the silencer and the evidence of the photographs are not so conclusive that “it is more likely than not that no reasonable juror would find [the defendant] guilty beyond a reasonable doubt.” *Sanders*, 2016 IL 118123 ¶ 47. The silencer evidence in the Defendant’s Petition does nothing to exonerate the Defendant or establish that she is innocent. *Collier*, 387 Ill. App. 3d at 636–37. The Defendant’s silencer evidence merely attempts to challenge the sufficiency of the evidence adduced at trial and on a rather minor point at that. *See Adams*, 2013 IL App (1st) 111081, ¶ 36. Obviously whether the Defendant used the particular silencer discussed in the book, built the exact way, or whether she used a silencer at all makes no difference in how the Defendant carried out her plan to murder Rhoni Reuter. As the prosecution stated during closing “[i]f for some reason you think a silencer wasn’t used, doesn’t make a difference.” (R.003962).

146. The Defendant also appears to miss the point on the true value of the “silencer evidence.” The point of this evidence was not that the Defendant was able to murder Rhoni Reuter with the homemade silencer she tried to build or how she was able to accomplish this. The real point of this evidence was this: less than two months before Rhoni Reuter is murdered, the day after running National database searches on Rhoni Reuter’s license plate (R.002972-74), the Defendant goes to a very specific section of a very specific website regarding firearm silencers. (R.002603-12). She purchases two separate books on how to make disposable silencers and

has such an urgent need for these books that she spends as much for shipping as the cost of each book in order to get the books the next day. (R.002616). The next day she goes to Home Depot and purchases the exact 13 materials listed in one of those books to construct one of the silencers. (R.002696-97). She then gives away one of the silencer books to her ex-boyfriend as a hilarious gag gift for his birthday, eight weeks after she purchased the book. (R.003131).

147. The clear and obvious value of this circumstantial evidence is compelling, even ignoring the overwhelming direct evidence in this case. The Defendant in her Petition completely ignores the irrefutable evidence of the Defendant's maniacal obsession with Shaun Gayle and Rhoni Reuter. This maniacal obsession was demonstrated by her numerous background searches of Gayle's female associates, internet searches of Reuter to include driving directions to Reuter's home, hacking and reading of Gayle's e-mail, and her sending harassing letters to Gayle's other girlfriends. When placed in the context of the Defendant's other maniacal behaviors regarding Shaun Gayle and Rhoni Reuter, the Defendant's intent behind her actions regarding the homemade silencer book is self-evident.

148. Regarding the Defendant's claims concerning ineffective assistance of counsel concerning the "silencer evidence," these are claims that are time-barred and would also be forfeited as they could have been raised in her appeal. As the trial counsel's assessment regarding how to "challenge" this evidence was a matter of trial strategy, it is also immune from an ineffective assistance challenge. *King*, 316 Ill. App 3d at 913.

149. Additionally, the Defendant's claims that "[n]o effort was made by trial counsel to challenge the assertion that Marni made a homemade silencer" is refuted by the record. The Defendant's trial attorneys extensively challenged the assertion a silencer was used. They

challenged that the Defendant purchased the proper materials to construct the pipe silencer depicted in the book. (R.002705-06); (R.002730-31). They challenged whether the silencers depicted in the book would even work. (R.002700-01). They challenged whether the silencers depicted in the book could be used without leaving physical evidence that would have been found at the crime scene. (R.002701-02). They challenged that a handgun could even hold a silencer of the lengths depicted in the book. (R.002709-10). They challenged that the officer purchased the same products that the Defendant purchased at Home Depot. (R.002712-13). They challenged the premise that the items purchased were nefarious by pointing out the common application of the items. (R.002714-15). Finally, they challenged that the prosecution expert did not even attempt to build the homemade silencer the prosecution theorized the Defendant used. (R.004028).

150. Finally, at paragraphs 133 and 153 the Defendant again claims the “silencer evidence” is a *Brady* violation or prosecutorial misconduct on the part of the prosecution for “advancing a patently false narrative” regarding the silencer evidence. The Defendant offers no evidence to support this claim of prosecutorial misconduct regarding this evidence. *See Rissley*, 206 Ill.2d at 412 (nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act.”). Contrary to Defendant’s claim, the evidence presented on the Defendant’s desire and effort to construct a homemade silencer was both true and quite compelling.

**11. CLAIMS REGARDING DEFENDANT'S LACK OF PROFICIENCY WITH
FIREARMS AND "NORMAL APPEARANCE" THE DAY OF THE MURDER**

151. The Defendant also claims that she is actually innocent of the murder of Rhoni Reuter and her unborn daughter because she wasn't proficient enough to "clear a lodged bullet five time while killing a pregnant woman in a condo building with neighbors who could confront the killer at any time during the attack." (Petition, para. 34). This claim of the Defendant's "lack of firearm proficiency" is found at 32-35. Many of the statements that make up this claim are not supported by any evidence contained within the Petition. For example, at paragraph 32 the Defendant claims to possess "minimal knowledge of a firearm" and that her shooting skills were obtained "solely for the protection of her children." These statements are based upon nothing. They are also contradicted by the record. Shaun Gayle testified that the Defendant told him she carried a gun when she was in rough areas reviewing property. (R.002866). She also told him that she had trained at the police academy. (R.002867). Don Mastrianni, the owner of the Illinois Gun Works shooting range, testified about the Defendant coming to the range with Salvador Devera multiple times "to build up her marksmanship" and practice with the Beretta 9mm. (R.003163-76).
152. At trial, Salvador Devera testified that the Defendant owned multiple handguns, including a .38 caliber, a .40 caliber, a .25 caliber, and the 9mm Beretta. (R.003082). He testified that he and the Defendant had taken the 9mm to the range a couple of times. (R.003082-83). On one of those occasions they took the 9mm to the range they had the grips changed so the Beretta would be easier to hold. (R.003083).

153. The Defendant's sole evidence concerning her claim that she "lacked firearm proficiency" and therefore would have been unable to "clear a lodged bullet five times while killing a pregnant woman" comes from Exhibit 12 to the Petition. This exhibit purports to be a typed question and answer interview purporting to be with Salvador Devera on January 24, 2019. At the end of this statement purports to be the signature of Devera. It lacks the certification of an affidavit or notarization.
154. As a threshold matter, as the People have argued above, this unsworn statement purporting to be from Mr. Devera is not an affidavit and at this stage of proceedings is legally insufficient evidence to support any claim in the Defendant's Petition. *Allen*, 2015 IL 113135 ¶72; *Velasco*, 2018 IL App (1st) 161683 ¶¶98-104.⁹
155. As another threshold matter, the purported statement from Mr. Devera does not constitute "newly discovered" evidence to support any claim of actual innocence as it constitutes facts that would have been known to the Defendant prior to her trial. *Barnslater*, 373 Ill.App.3d at 523-524. ("Evidence is also not newly discovered when it presents facts already known to a petitioner prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative."). The fact that that Defendant was not proficient enough with a handgun to gun down Rhoni Reuter in her apartment would have been a fact known to the Defendant and an available argument to her at her trial. In fact, the Defendant's trial attorneys argued this same point at the Defendant's trial. (R.004015-16).

⁹ Exhibit 12 lists Devera's name as "Salvatore Devera." but in the trial transcript he spells his last name "Salvador Devira." (R.003061).

156. Additionally, Mr. Devera's opinion that the Defendant was not proficient enough to "clear jams in a rapid manner" is contradicted by the record. First, as the State's firearm expert, Mr. Striupaitis made clear, clearing a jammed cartridge from a Beretta was a simple matter of pulling the slide rearward to extract and eject the jammed cartridge. (R.003271). This is the same process required to load the handgun. (R.003229). Second, there was nothing in the record to suggest the Defendant would have had to act in a "rapid manner" at all. As the evidence at trial made clear, the live rounds ejected from the firearm were next to Rhoni Reuter where she was lying on the kitchen floor next to the refrigerator. It didn't appear that the Defendant was chasing Reuter around the apartment when she was ejecting these live rounds. Rather, it appeared from the evidence that the Defendant cleared the jammed live rounds while standing over Reuter's body in order to deliver a final execution-style kill shot to Reuter's head. (R.004056-57). Contrary to the purported opinion of Mr. Devera, the Defendant's "amateur level" proficiency in firearms was sufficient to murder Reuter.

157. The evidence of the unsworn statement of Mr. Devera is also not so conclusive that it is more likely than not that no reasonable jury would find the Defendant guilty beyond a reasonable doubt. *See Sanders* 2016 IL 118123, ¶ 47. Since this entire statement purporting to be from Mr. Devera is essentially offered on his opinion regarding the Defendant's firearm proficiency, this opinion would be inadmissible at any trial. The statement would also merely contradict the testimony of other witnesses as well as a large body of other evidence to include the Defendant's own recorded statements on how she carried out the very murder Devera believed she was not proficient enough with firearms to commit.

158. Finally, the unsworn statement purporting to be from Devera is also offered to support the claim the Defendant makes at paragraph 103 that Devera saw her the day of the murder, that the Defendant “looked and acted normal,” and that her hair “was normal and not wet.” (Petition, para. 12).
159. Devera already testified regarding his contact with the Defendant on the day of the murder. (R.R003089-93). Devera testified that the Defendant contacted him at approximately 10:00 a.m. when she knew he would be at work and told him the battery in her car was dead. (R.003089-91). Devera couldn’t get over to the Defendant’s home until his lunchbreak at noon. (R.003092-93). When he came over to the Defendant’s house to get the battery, he saw the Defendant. (R.003093). Mr. Devera also provided this same testimony on cross-examination. (R.003120-22).
160. The information provided by Devera in Exhibit 12 supporting the claim made at paragraph 103 of the Petition is not newly discovered evidence. That is information that would have been available at the Defendant’s trial with the exercise of diligence. *Barnslater*, 373 Ill.App.3d at 523-524. (“Evidence is also not newly discovered when it presents facts already known to a petitioner prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative.”).
161. This opinion that the Defendant “appeared normal” is also not so conclusive that it is more likely than not that no reasonable jury would find the Defendant guilty beyond a reasonable doubt. *See Sanders* 2016 IL 118123, ¶ 47. The State’s theory of the case was that the Defendant contacted Devera regarding the battery to use him as an unwitting alibi witness as she was attempting to firm up her “car trouble” alibi after the murder. (R.004050). When Devera sees

the Defendant at noon, she has already dropped off her Enterprise rental car and contacted Christi Paschen with the coded telephone call from her burner phone telling Paschen that she had completed the murder. (R.004050-51). It is hardly surprising, let alone compelling that the Defendant would appear “normal” to Devera.

162. This opinion purporting to be from Devera that the Defendant did not appear to be “anxious, nervous, or upset” when he saw her on his lunch break after the murder of Rhoni Reuter, is actually consistent with the State’s evidence at trial. (Petition, Exh. 12). As the evidence showed during the trial, the Defendant had posed as another one of Shaun Gayle’s girlfriends to send out harassing e-mails to his other female associates. (R.002918-20). When the Defendant found out that her harassing e-mails got one of Gayle’s female associates in trouble and in danger of being deported, the Defendant laughed about it to Julie Fields. (R.002920). The Defendant also obviously bragged about murdering a pregnant woman and her unborn child while dining over tea and ice cream at a Denny’s Restaurant. (R.003972). So, it was not surprising that she did not appear “anxious, nervous, or upset” to Mr. Devera after murdering Rhoni Reuter and her unborn child. This was in fact evidence the jury was asked to consider when it determined that the Defendant committed these two murders in a cold, calculated, and premeditated manner.

12. CLAIMS INEFFECTIVE ASSISTANCE OF COUNSEL

163. In addition to the specific claims the Defendant makes regarding ineffective assistance of counsel in conjunction with other claims made in the Petition, the Defendant makes several generalized claims of ineffective assistance found at paragraphs 15-17, and 131 of her Petition.

164. As an initial matter, the Defendant refers to her trial counsel at paragraph 8 in her Petition as two “journeymen lawyers.” It is unclear on what evidence the Defendant bases this assertion.¹⁰ In the record, the court even notes that the Defendant’s lead counsel had practiced for 40 years and was a deputy State’s Attorney, albeit while chastising him for asking an improper but admittedly damaging question to Christi Paschen. (R.003539-40).

165. As another initial matter, the Defendant’s numerous claims of ineffective assistance of counsel are forfeited. Every one of these claims found in the Defendant’s Petition is based upon the investigative performance or trial performance of her attorneys. These were all issues that could have been raised during the Defendant’s appeal by her newly appointed appellate counsel. (See Notice of Appeal, filed June 6, 2011). As the appellate court opinion makes clear, the Defendant’s appellate counsel in fact did raise other claims of ineffective assistance of counsel regarding the Defendant’s trial attorneys during the Defendant’s appeal. *Yang*, 2013 IL App (2d) 110542-U, ¶39 (counsel not ineffective for failing to raise proper arguments for suppression of wiretap recordings). These claims were denied. But more importantly, the Defendant could have also raised the claims of ineffective assistance in her appeal that she now advances in this Petition. As such, these claims are forfeited. *Tenner*, 206 Ill.2d at 392.

166. The Defendant’s first claim is that when the Defendant’s trial attorneys were provided discovery they felt “crushed and overpowered.” The Defendant refers to nothing to support this contention. Contrary to the Defendant’s assertion, the Defendant’s attorneys made numerous efforts to both obtain and review the discovery in this case. They issued several

¹⁰ Although not evidence of record in this case, it is interesting to note that, according to www.iardc.org attorney William Hendrick was admitted to the bar on November 16, 1970. Attorney Jeffrey Lerner (now deceased) was admitted to the bar on October 17, 1974. The Defendant’s current attorney was admitted to the bar on May 6, 1976.

subpoenas to the law enforcement and other agencies involved to obtain relevant materials and to ensure discovery was being complied with (R.000024-29); (R.000160-66); (R.000455-59); (R.000484). They filed several relevant discovery motions that are inconsistent with the Defendant's assertion that her trial lawyers simply "ignored" the discovery. These motions are included their June 11, 2010 "Motion to Compel The People to Disclose and Identify Documents and Witnesses They Intend to Use at Trial," (C.000203). They also include "Motion to Inspect Physical Evidence and Perform Physical Testing if Required on June 11, 2010 (C.000187). The defense filed a motion on June 11, 2010 to "Require the People to Disclose and Identify Records Concerning Various Telephone Numbers and Online or Web Accounts. (C.000195). They filed a Motion on May 24, 2010 to Request the Prosecution to Disclose Promises to Witnesses. (C.0175). On February 18, 2011 the parties entered into an Agreed Order with the court where, in paragraphs 6, 8, 9 and 11 of the order the parties certified that the motions were granted, and the State has complied with the motions. (C.000614-15).

167. In short, the record refutes the Defendant's claim that the Defendant's attorneys were ignoring the discovery materials. Instead, they were actively seeking discovery, actively inspecting evidence in the possession of the police, and actively prosecuting their motions to ensure they were complied with.

168. Regarding the Defendant's claim at paragraph 17 of her Petition that her trial attorneys were ineffective for failing to "challenge" the gas station video, 9mm Beretta handgun, homemade silencer, Tracfone, and bracelet, the record again refutes this claim. The Defendant's specific claims of ineffective assistance of counsel regarding the gas station video, homemade silencer, TracFone, and bracelet were already discussed. Regarding the

Defendant's assertion that her trial counsel was ineffective for failing to "challenge" the Beretta, it is unclear what the Defendant is asserting. The Defendant's trial counsel argued extensively the unbelievability of the story that the Beretta was encased in cement. (R.004023-24). They called the Defendant's mother as a witness to state that the Defendant gave her the Defendant's guns for safekeeping in July of 2007. (R.003882-84). They adduced from Devera that the Defendant was not familiar with firearms when he first met her. (R.003101). They made an offer of proof with Devera attempting to establish that one of the items discussed during the Defendant's family meeting was a handgun. (R.003110-13). Unfortunately, Devera steadfastly denied that it was ever mentioned that a firearm went missing. (R.003113).

169. It is difficult to see how the Defendant's attorneys were ineffective for otherwise failing to "challenge" the Beretta as the Defendant claims. As noted above, the Defendant's children were available as witnesses and could have been called as witnesses by the Defendant to support this claim that the Beretta was stolen, or in support of the Defendant's alibi for that matter. The record demonstrates, however, that the Defendant's children had previously provided statements to the police that the Defendant had told them to lie. (R.002969); (Petition, Exh. 13, pg. 005880). It was therefore an objectively reasonable trial strategy for the defense to have avoided such an approach. *People v. Patterson*, 217 Ill.2d 407, 442 (2005).

170. At paragraph 131 of the Defendant's Petition, the Defendant again makes similar claims of ineffective assistance that were elsewhere addressed in this motion. In addition to their previous allegations, however, the Defendant alleges her trial attorneys were ineffective for failing to investigate alternative suspects. The Defendant refers to no evidence in support of this. In fact, the record refutes this claim. The trial record demonstrates repeatedly the efforts

of the Defendant's attorneys to suggest that either Shaun Gayle or Monika Krowska were possible suspects that were too quickly ignored by police. Regarding Krowska, they even presented evidence that Gayle obtained an order of protection against her and presented evidence that she was otherwise violent toward him. (R:004005).

171. The Defendant at this same paragraph 131 also claims her trial attorneys were ineffective for the "failure to examine overhear logs and challenge the absence of exculpatory tape recordings." (Petition, para. 131). This claim is also unsupported by any evidence. The Defendant provides no evidence that his attorneys failed to examine the overhear logs or review the overhear recordings. The record also refutes such a claim. On May 24, 2010, the Defendant's trial attorneys filed a "Motion to Require the Prosecution to Disclose Authorizations, Protocols, and All Records Regarding Recordings." (C.000173). In paragraph 11 of the Agreed Order with the court filed February 18, 2011, it indicates again that State has complied with the requests in this motion." (C.000615). The Defendant's trial attorneys conducted an extensive hearing regarding the policies and procedures surrounding the wiretaps that were conducted in this case. (R.000601-80). The Defendant does not articulate how her trial counsel could have otherwise challenged "the absence of exculpatory tapes" particularly if the recordings simply did not exist or contain any information that would have been admissible and truly exculpatory. There was nothing in counsel's performance on this issue that was objectively unreasonable.

172. Finally, regarding all of these claims of ineffective assistance of counsel, the Defendant has failed to articulate any prejudice in the alleged deficiencies in the performance of her trial

attorneys. None of the claimed errors of the Defendant's trial attorneys would have affected the outcome of the Defendant's trial.

13. THE DEFENDANT'S CLAIM REGARDING THE "TIRE TRACKS"

173. The Defendant makes a claim concern of "tire track photos." This claim is found at paragraph 110 of the Defendant's Petition. In support of this, the Defendant attaches Exhibit 42, which is a Bate-Stamped police report documenting the location of 11 photographs that were taken of tire tracks observed on the West end of the parking lot outside Rhoni Reuter's apartment on October 4, 2007 by evidence technician Cesar Flores. (Petition, Exhibit 42). This role of film was labeled in the report as "CAF002." (Petition, Exhibit 42).
174. As a threshold matter, the Defendant does not allege any constitutional claim regarding these tire track photographs. She does not allege these photographs are "newly discovered evidence unavailable sooner with the exercise of due diligence, nor could she. As can be observed partially concealed below the "Defendant's Exhibit 42" sticker is the bate stamp "006772" which corresponds to the People's initial Disclosure to the Accused filed May 13, 2009 where the Defendant received initial reports 1 through 7732. (C.000039). The Defendant was therefore disclosed the existence of these photographs on May 13, 2009.
175. The Defendant's trial attorneys viewed all of evidence in this case at the Criminal Investigations Division of the Lake County Sheriff's Department. The Defendant's attorneys filed a "Motion to Inspect Physical Evidence and Perform Physical Testing if Required on June 11, 2010 (C.000187). Her attorneys informed the court that they were going through all the physical evidence as early as October 8, 2010. (R.00198). The Defendant's attorneys provided

status updates on how they reviewed all the physical evidence and were down to the last box on November 16, 2010. (R.000361-65). As the supplemental disclosure of discovery filed on December 3, 2010 indicates, her attorneys requested copies of some of this evidence after physically inspecting it but did not request production of these particular photographs. (C.000515). Her trial attorneys discuss going through all the physical evidence again on the record on December 7, 2010 in the context of the materials requested after their physical inspection of the evidence, (R.000457). During this exchange, the Defendant's trial attorneys were very clear that the prosecution was being very forthcoming in the production of this evidence and that they were held in the highest regard. (R.000459). On February 18, 2011 the parties entered into an Agreed Order with the court where, in paragraph 8 of the order, the parties certify that "The Motion to Inspect Physical Evidence filed 6/11/10 is granted & the State has complied with the requests in this motion." (C.000614).

176. Since the Defendant was disclosed the existence of these photographs prior to her trial, this evidence would have been available to the Defendant at any time prior to her trial with the exercise of due diligence.. *See, e.g., Snow*, 2012 IL App (4th) 110415, ¶ 39 (evidence is not "suppressed" or "withheld" for purposes of the *Brady* rule if it available to the defense with the exercise of due diligence.).

177. It is important to note that the Defendant has not claimed these photographs are material in any way. Nor could she. The photographs were taken of the West end of the parking lot on October 4, 2007. The black sedan Peter Cowles observed the suspect run up to and get inside was not parked in this parking lot. (R.002371). The suspect vehicle was parked in the parallel spaces next to the parking garage, East of the parking lot. (R.002371-75). The car Cowles

observed was pointed North toward Elm street in the parking spaces for residence with two cars – not in the parking lot of 441 Elm Street. (R.002379-80).

178. The fact that the police took random photographs of tire tracks in the parking lot is not surprising given what little the police knew at the time the photographs were taken. The police did not have any information regarding a possible suspect vehicle at the scene during the time of the murder when the photographs were taken. (R.002394-96). At the time the photographs were taken, Cowles had told the police that he saw a black teenage boy running through the parking lot to the car parked by the garage at 8:00, nearly ten minutes after the shots were heard and 911 was called. (R.002383). It wasn't until the next day when Cowles checked with his health club and learned he got to the club at 8:05, so it would have been approximately 7:53 a.m. when he saw who he believed to be a black teenage boy getting into the car. (R.002396). This new time provided by Cowles corresponded with the time Ms. Christa Amsden heard the "plop plop" gunshots, screams, and the crash coming from Reuter's apartment. (R.002342).

14. THE DEFENDANT'S "TRAJECTORY EXPERT"

179. The Defendant claims "newly discovered" evidence in the form of the expert opinion of John Larsen, who is proffered as an expert in the fields of "crime and shooting incident scene reconstruction." (Petition, Exh. 44, Page 1 of 23). This expert reviewed the trial discovery in this case, as well as additional photographs requested by the defense and renders an opinion that the killer of Rhoni Reuter "was approximately 5 feet 10 inches or more in height" based upon his analysis of the crime scene. (Petition, Exh. 44, Page 4 of 23).

180. As a threshold matter, the People dispute the Defendant's assertion that this would be newly discovered evidence unavailable prior to the Defendant's trial with the exercise of due diligence. An expert's conclusions based upon previously available evidence as a matter of law do not constitute "newly discovered" evidence for purposes of advancing a claim of actual innocence. *Patterson*, 192 Ill.2d at 140; *see also Hauad*, 2016 IL App (1st) 150583 ¶ 54-55 (a new assessment of previously available evidence does not constitute newly discovered evidence).
181. The Defendant seeks to avoid this rule by claiming that this type of crime scene analysis by their retained expert was unavailable to the defense at the time of trial. (Petition, para. 114). Specifically, the Defendant refers to 8 rolls of undeveloped film with evidence number CAF001, which appear to be backup photographs taken of the crime scene by the Lake County Major Crimes Task Force on October 4, 2007 and were developed and provided to the Defendant pursuant to an agreed court order entered on July 13, 2018. (See 7/13/2018 "Agreed Order," para. 3). This is reflected in the Defendant's Petition, Exhibit 43.
182. The Defendant attempts to weave this allegation concerning "newly discovered" photographs into an allegation of a *Brady* violation claiming that the prosecution "intentionally concealed the existence" of these photographs. (Petition, para. 125). The Defendant then argues that not having these photographs "crippled the defense" by preventing them from obtaining an expert to determine the height of the shooter." (Petition, para. 114).
183. As a threshold matter, the Defendant cannot claim a *Brady* violation regarding these photographs because the existence of these photographs was disclosed to the defense from the photologs tendered to the defense a decade ago, on May 13, 2009, in the People's initial

Disclosure to the Accused filed May 13, 2009 where the Defendant received initial reports 1 through 7732. (C.000039). As the Defendant's attachments indicate in their "Addendum to Marni Yang's November 30th Motion for Discovery," filed December 11, 2017, which for the first time requested these photographs, the photologs that describe these photographs are Bate Stamped 006760-62. The actual Bate Stamped photologs themselves were attached to the Defendant's Motion filed November 30, 2017 entitled "Marni Yang's Omnibus Request For Discovery In Her Efforts to Advance Her Claims Of Actual Innocence For Her Impending Post Conviction Petition." Again, these photologs are Bate stamped as 006756-62.

184. All of these photologs were tendered to the Defendant years prior to her trial. The Defendant cannot therefore claim this evidence was "intentionally concealed" as she now asserts. (Petition, para. 125). Furthermore, as articulated more fully at paragraph 176, *supra* the Defendant's trial attorneys physically inspected all the evidence in this case and were able to request production (or reproduction) of any of the photographs contained on the rolls of film upon request. The Defendant's trial counsel did avail themselves of requesting certain materials they thought material to their case, and those materials were promptly tendered as the Supplemental Answer to Motion for Discovery filed December 3, 2010 demonstrates. (C.000515).

185. As previously stated, the actual photographs at issue on the 8 rolls of film are documented in Defendant's Exhibit 43 to her Petition, as well as the crime scene and autopsy photographs that were admitted at her trial. The photographs on the 8 rolls of film, as the Defendant's investigators indicate in their report found at Exhibit 43 are back up crime scene photographs from a third camera that are largely duplicative of the trial exhibits. (Petition, Exh. 43). The

description of the photographs contained on these rolls of film is consistent with how the photographs are described in the Bate Stamped photologs enclosed by the Defendant in support of her November 30, 2017 entitled “Marni Yang’s Omnibus Request For Discovery In Her Efforts to Advance Her Claims Of Actual Innocence For Her Impending Post Conviction Petition.”

186. Contrary to the Defendant’s assertion, the existence of these photographs was of no surprise to the Defendant. The photographs were available and the content of those photographs were well-described, including descriptions of the use of “laser and powder” that the Defendant now asserts was important to a trajectory analysis. (See Bate Stamped page 006762 attached to Defendant’s November 30, 2017 Motion). These photographs could have been easily requested by the Defendant at any time prior to her trial. Indeed, that is exactly what that Defendant did now, some six years after her trial, in support of yet a different theory of why she is innocent.

187. Not only was the Defendant on notice of the existence of these photographs, but also that laser trajectory rods were used at the crime scene. This evidence was contained in numerous other duplicative photographs that were admitted at the Defendant’s trial, discussed in pretrial hearings, and contained within the record. (R.000922); (R.000939-41); (R.002542-47). The Defendant fails to establish the materiality of these photographs or articulate any prejudice at all in how her trial attorneys were “crippled” in exploring the trajectory analysis her expert now advances. (Petition, para. 114). “To establish materiality, an accused must show ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” *Beaman*, 229 Ill.2d at 74 (quoting *Coleman*, 183

Ill.2d at 366). Evidence is not material if it is merely cumulative. *Harris*, 206 Ill.2d at 312 (citing *People v. Cloutier*, 191 Ill.2d 392, 400–401 (2000)).

188. Contrary to Defendant's assertions at paragraph 133 of her Petition, there is nothing in the crime scene photographs that is "clearly exculpatory." Indeed, the photographs themselves appear duplicative of the numerous photographs that were admitted at the Defendant's trial. There was no disclosure of a defense theory involving "laser trajectory" or any specific discovery request for these types of photographs that would have put the prosecution on notice of the materiality of the photographs in relation to the defense theory of the case. See *People v. Hovanec*, 76 Ill.App.3d 401, 416 (1st Dist., 1979) (absent a specific request a prosecutor is required to disclose only obviously exculpatory evidence), citing *United States v. Agurs*, 427 U.S. 97, 107 (1976). The Defendant's analysis of what constitutes a *Brady* violation is flawed. The Defendant requested the court to engage in a *post hac* analysis of what evidence is exculpatory by the Defendant hiring an expert years after her trial, having the expert request photos be developed that had always been available, claiming that reviewing them would be useful, reviewing those photos, and then claiming a *Brady* violation because the photos are now deemed useful to the expert.

189. The Defendant's assertion at paragraph 114 that the defense obtained the original discovery from the Defendant's trial counsel and that the "trajectory photos" were not tendered to them is a statement of fact not supported by the record or evidence contained within the Petition. It should not be considered.

190. Additionally, the assertion in paragraph 114 that not having these photographs "crippled the defense" in their ability to "hire an expert to determine the height of the shooter" is also

contradicted by the Defendant's own evidence. (Petition, para. 114). As is evident from the Defendant's expert report found at Exhibit 44, the Defendant's expert was conducting comparison laser studies to determine the height of the shooter back on September 24, 2017, a year prior to requesting and being provided with the photographs the Defendant claims are now so critical. (Petition, Exh. 44, Page 12 of 23). Additionally, none of the photographs the Defendant claims are so crucial to this trajectory analysis are even included or referred to in the expert's report – particularly not in the section of the report dealing with the "5'10" or taller" shooter. (Petition, Exh. 44).

191. The Defendant could have retained this expert prior to her trial and could have requested any of the photographs this expert wished to have. The existence of these photographs was disclosed to the Defendant and they were available to be produced to the Defendant prior to her trial with the exercise of due diligence. Therefore, this expert's opinion is not newly discovered evidence and it is legally insufficient to support her claim of actual innocence. *See Hickey*, 204 Ill.2d at 601-02. Since the Defendant was also disclosed the existence of these photographs prior to her trial the Defendant cannot now claim a *Brady* violation simply because the Defendant now finds use for these photographs.

192. Assuming for the sake of argument that the Defendant's evidence is "newly discovered" for purposes of supporting a claim of actual innocence, the claim will still fail because this evidence is not so conclusive that "it is more likely than not that no reasonable juror would find [the defendant] guilty beyond a reasonable doubt." *Sanders*, 2016 IL 118123 ¶ 47. Evidence that merely contradicts the evidence adduced at trial not typically of such conclusive character as to justify postconviction relief. *Collier*, 387 Ill. App. 3d at 636–37. Obviously, the

expert's conclusion that "the shooter was between 5'10'' or taller is contradicted by the eyewitness testimony presented at trial. This evidence would also obviously contradict the testimony of Christi Paschen whom the Defendant confessed to as well as the Defendant's own recorded conversations.

193. This expert's conclusion is contradicted in a more profound fashion that is fatal to the entire opinion. As the expert's report indicates, the entire basis for concluding that the shooter was 5'10'' or taller was based on the expert's assumptions concerning "Wound B" which was labeled based upon the Autopsy Report from the medical examiner, Dr. Manny Montez. (Petition, Exh. 44, Page 10 of 23 to Page 11 of 23). The expert concludes that the remaining wounds, A, C, D, E, F, and G could have been made by a shooter who is 5 feet tall. (Petition, Exh. 44, Page 12 of 23).

194. In support of the expert's conclusion regarding the trajectory of "Wound B", the expert relies upon the autopsy report of Dr. Montez where he writes that the direction of travel regarding this wound as "front to back, right to left, and downward." (Petition, Exh. 44, Page 11 of 23). The expert repeats this assumption again when he refers to the autopsy photographs showing the protrusion rod going through "Wound B" and he cites page 3, Section B of Dr. Montez's autopsy report. (Petition, Exh. 44, Page 16 of 23).

195. Based upon these assumption, the expert forms an opinion of the order of shots, the position of Reuter, the position of the Defendant, the hand the weapon was held in, and obviously that Wound B could have only been generated by someone who is 5 feet 10 inches tall or taller. (Petition, Exh. 44, Page 20 of 23 to Page 22 of 23).

196. The expert's assumption regarding "Wound B" traveling "front to back, right to left, and downward" is contradicted by the record and by the author of the very autopsy report which the expert relies. Dr. Manny Montez testified at the Defendant's trial. (R.003795-3845). He described for the jury his findings regarding this "Wound B" as well as showing the path of this bullet on a diagram. (R.003807). Dr. Montez described this wound as "a perforating injury – meaning the bullet is going to go into the body and also exit." (R.003807). He goes on to describe "Wound B" as follows:

The entrance wound is on the left side of the chest, just below the clavicle. The clavicle would be approximately here. The entrance wound is on the left side of the chest, just below the clavicle. The exit wound is on the front part of the left upper arm. So the entrance wound is on the left side of the chest below the clavicle. The exit wound is on the front outside part of the left upper arm. Although this wound pathway looks like it's going downward, when I did the examination of the tissues, **it's actually going upward**. And what that means is that this left upper extremity, the whole arm has been moved up this way – somewhere in the region of the head – bringing the shoulder up, which brings the left upper arm up, and makes it alignment in a direction like this. **The wound pathway is going upward actually.**

(R.003807-08) (emphasis added).

197. During the description provided by Dr. Montez quoted above, Dr. Montez raised his left arm over his head to indicate the potential trajectory of the path of Wound B. (R.003808). Dr. Montez also marked this trajectory on the diagram admitted as People's Exhibit 260, with the letter "B" made in blue pen and an "O" where the entrance was and an "X" with the exit location for this wound track. (R.003808-09). Dr. Montez further stated regarding "Wound B" the following:

The wound pathway, as I said, was dissected out. That's how I know that **the gunshot wound is going upward with the left arm up**. It is what we call a subcutaneous wound pathway only. It does not go or communicate with the left chest cavity. It does not communicate with the neck.

(R.003809) (emphasis added).

198. Obviously, this testimony contradicts the Defendant's "expert opinion" in a fundamental respect. It appears that the entire opinion of the Defendant's expert was based upon a very flawed premise which resulted in a very flawed conclusion, namely the "downward" trajectory of the bullet causing "Wound B," which the expert concludes would then have to come from a very tall (5'10" or taller) shooter. Striking, of all the materials the expert reviewed to prepare his opinion in his report, this expert never chose to review the transcript of Dr. Montez's trial testimony or the diagram Montez refers to in his testimony that was admitted at trial as People's Exhibit 260. (Petition, Exh. 44, Page 4 of 23 to Page 7 of 23). This is even more striking considering the Defendant's own investigators had previously photographed this diagram, People's Exhibit 260, where Dr. Montez drew the bullet path of "Wound B" based upon his dissection of the wound and examination of the surrounding tissue. (Petition, Exh. 43, Page 2/130, IMG_0007.JPG).

199. It is important to note that this expert of the Defendant is a self-professed expert in the fields of "crime and shooting incident scene reconstruction." (Petition, Exh. 44, Page 1 of 23). This expert would be therefore unqualified to render any opinion in the scientific field of forensic pathology, which is the area of expertise concerning the direction the bullet paths took through the body of Rhoni Reuter. *See King*, 2020 IL 123926 ¶¶ 36 (an expertise in crime scene analysis does not qualify a witness to render opinions in the scientific field of forensic pathology and it is error to allow such opinions). Regardless, it does not appear that the opinion of the Defendant's expert conclusions regarding "Wound B" would have any validity since

they fundamentally rely upon a flawed understanding of the pathologist's conclusions concerning this wound.

200. While the court cannot make any credibility determinations at this stage of the proceedings, regardless of how flawed this particular expert's conclusions might be, the court may deny a claim that merely contradicts evidence that was adduced at trial as this evidence is not typically of such conclusive character to justify postconviction relief. *Sanders*, 2016 IL 118123, ¶ 42; *Collier*, 387 Ill. App. 3d, 636–37. The proffered opinion of the Defendant's expert found at Exhibit 44 is contradicted by the evidenced adduced at trial, most prominently the testimony of Dr. Montez himself. This expert opinion therefore is not so conclusive that no reasonable jury would find the Defendant guilty beyond a reasonable doubt, particularly given the fundamental flaws in this opinion. *See Sanders* 2016 IL 118123, ¶ 47. Additionally, given the overwhelming evidence of the Defendant's guilt, the Defendant would also fail to establish the materiality requirement of any hypothetical *Brady* violation, as this "suppressed" evidence in no way puts "the case in such a different light as to undermine the confidence in the verdict." *Coleman*, 183 Ill.2d at 393.

15. CLAIMS REGARDING THE "TRACFONE" DISPOSABLE PHONE

201. The Defendant makes several claims regarding her Tracfone disposable phone. These claims are found at paragraphs 39-45 and 133 of the Defendant's Petition.

202. The Defendant first claims at paragraph 39 of her Petition that "[d]uring the course of the trial prosecutors told the jury that according to the cell tower reports on the TracFone, Marni Yang was in the vicinity of Christi Paschen's on the day of the crime." The Defendant repeats

this claim at paragraph 42 of her Petition where she asserts that “[a]t trial the State relied heavily on the cell tower report calls made from Arlington Heights on the day of the crime.” (Petition, para. 42). These statements are not true. The location records for the Defendant’s TracFone were not admitted at trial, nor was this information ever argued to the jury.

203. The Defendant appears to confuse the evidence admitted at her trial with the television shows regarding her case where investigators spoke about this cell tower information. This information was discussed in one of the Defendant’s post-trial motions where the defense claimed a *Brady* violation for the prosecution not disclosing this evidence. (R.004167-76). The arguments concerning that motions are found in the pleadings at (C.000.829) and (C.000832) (defense) and (C.000909) (prosecution). This evidence concerning the TracFone location data was not admitted against the Defendant at her trial, however, and the Defendant’s claim of a constitutional violation (if any) on this basis is unwarranted.

204. The Defendant also makes a claim at this same paragraph 39 that prosecutors relied on this “cell tower report” as evidence contained within the body wire application. This part of her claim is true. The court’s ruling listing this cell tower information as one of several pieces of evidence the court considered (R.000804).

205. The defense claims based upon the Tracfone log found at Exhibit 15 that the prosecution lied to the court by claiming that Enterprise Car Rental, Christi Paschen, and Andrew Yang were the only people the Defendant contacted on her TracFone, when the call log shows calls to other numbers.

206. First, the exact language in the application the Defendant refers to is that “Christi Paschen and Andrew Yang were the only people, other than Enterprise Rent-A-Car, that Marni Yang

communicated with on the TracFone.” (Defendant’s Exhibit 14, Bate stamp 006915). The TracFone information found at Exhibit 15 is consistent with this summary, as the only significant amount of time spent on the phone is to Christi Paschen, Andrew Yang, and Enterprise Rent-A-Car.

207. Second, and most importantly, the Defendant does not articulate how any of these allegations contribute to her claim that she is actually innocent. Assuming for a moment that the Defendant’s assertions regarding “passing off” fabricated phone records is true, (which it is not), nothing in these allegations exonerate or vindicate the Defendant of murdering Rhoni Reuter such that they would support a claim of actual innocence. *House*, 2015 IL App (1st) 110580, ¶41.

208. The Defendant’s claims also do not constitute newly discovered evidence such that could support an actual innocence claim. Exhibit 15 of the Defendant’s Petition contains the Bate stamp of “006617” which means this document would have been tendered in the Initial Disclosure to the Accused on May 13, 2009. (C.000039).

209. Quite the contrary. The Defendant’s claims at paragraphs 39-45 and 133 are merely challenges to the pretrial court orders regarding the eavesdropping devices under 725 ILCS 5/108A (“108A Order”) and for electronic surveillance under 725 ILCS 5/108B (“108B Order”). The Defendant’s trial counsel made very similar challenges to these same court orders. (C.000181-84). Some of the same challenges the Defendant’s trial counsel raised with the trial court were also raised in the Defendant’s appeal. *Yang*, 2013 IL App (2d) 110542-U, ¶¶ 33-55. To the extent that the Defendant’s new claims regarding these 108A and 108B orders are duplicative to the issues she raised on appeal, they are therefore barred by *res judicata* and

to the extent they were not raised on appeal they are deemed forfeited. *Tenner*, 206 Ill.2d at 392.

210. The Defendant cannot articulate any prejudice for purposes of an ineffective assistance of counsel claim regarding her trial counsel not raising the challenge she now advances. As the court's ruling made clear, there was a substantial basis for the issuing judge to believe that a person has committed or was about to commit a felony. The court issued an extensive ruling listing numerous items of evidence to support the issuance of the 108B order. (R.000797-804). Nothing in the Defendant's instant assertions would undermine the evidence presented to support this conclusion. Nor would they undermine the reasonable cause for the issuance of the 108A order.

211. Regarding the remaining allegation concerning the TracFone, the Defendant claims that the prosecution fabricated the Tracfone phone record she attaches to her Petition as Exhibit 15. In support of this claim, the Defendant refers to Exhibit 16 of her Petition. This document contained in Exhibit 16 appears to be a memo dated April 14, 2018 from one of the Defendant's retained investigators addressed to the Defendant's book publisher. (Petition, Exh. 16). As an initial matter, this memo is an unsworn/unnotarized statement containing uncorroborated hearsay that is legally insufficient to support any claim in the Defendant's Petition. *Velasco*, 2018 IL App (1st) 161683) ¶¶98-104. More importantly, there is nothing in this hearsay statement that supports the Defendant's assertion at paragraphs 43-45 that the prosecution fabricated the TracFone document. Quite the contrary. The memo merely explains that TracFone doesn't have their own cell towers, so cell site information (latitude and longitude) would have had to have come from AT&T. The TracFone document in Exhibit 15 doesn't have

this cell site (latitude and longitude) data. There is nothing in this memo regarding the conversation with TracFone that TracFone doesn't provide data concerning the city and state, or that the document contained in Exhibit 15 was not generated by TracFone and was somehow a fabrication. The Defendant's claim the TracFone document is fabricated is not supported by the Defendant's enclosed Exhibits as it is the Defendant's burden at this stage and therefore this claim too should be dismissed. *See Coleman*, 183 Ill.2d at 381.

16. CLAIMS REGARDING EMILY YANG

212. The Defendant makes several claims regarding the Defendant's daughter, Emily Yang, who testified against the Defendant at her trial. These claims consist of a *Brady* violation for the prosecution suborning perjury, found at paragraphs 127-128 and 133, and a claim supporting the Defendant's alibi and her actual innocence, found at paragraph 99. The Defendant's unsworn/unnotarized statements of Emily Yang are found at Defendant's Exhibits 35 and 46a.

213. First, regarding the Defendant's claims of subornation of perjury, these claims are contradicted by the record. On February 28, 2011 the People filed their "People's Supplemental Motion *In Limine* Regarding 404(b) Evidence." (C.000640). In paragraph #6 of this motion, the People proffered for the court that Emily Yang wrote a statement for the police describing how the Defendant made efforts to learn about the other women Shaun Gayle was seeing and then would send them letters in an effort to get them to leave Gayle. (C.000642). Attached to this motion as Exhibit 7 was the proffered written statement Emily Yang provided to the police. (C.000650). On February 28, 2011 a Ms. Sheila Kies entered her appearance in

the Defendant's case on behalf of Emily Yang. (R.000900). Ms. Kies tried unsuccessfully to assert Emily's fifth amendment rights on the basis that she could theoretically be sued in connection with the Defendant. (R.000902). Ms. Kies certainly never proffered that Emily Yang wished to invoke her fifth amendment rights based upon a claim that she provided false statements to the police. (R.00902-05).

214. The People also noted that, since providing the written statement, Emily Yang had chosen not to speak further to the police or the prosecution. (R.000905-06). The court requested an offer of proof from the prosecution prior to Emily Yang testifying to establish her basis for being able to say her mother was obsessed with Shaun Gayle (R.000906). On March 8, 2011, during the trial, Emily Yang was present again with Ms. Kies. The prosecution again indicated that they tried to speak with Emily Yang but was told by Ms. Kies that such a conversation would only be possible when Emily Yang was on the witness stand. (R.002904-05). Ms Kies did not proffer to the court any additional reasons for Emily Yang to invoke her fifth amendment rights, and she represented that Emily Yang would be testifying under subpoena. (R.002906). The court stated that Emily Yang didn't have to talk to the prosecution if she didn't want to. (R.002906). The court also notified defense counsel that they could cross examine Emily on the circumstances behind the statement she provided. (R.002907).

215. Emily Yang testified consistently with the written statement she provided to police and never testified what she told the police was untrue. (R.002957-71). On cross examination defense counsel brought out the circumstances on how she was interviewed by police. (R.002963-71). Emily Yang, again, never said that she was threatened to tell the police what she told them or that what she wrote was untrue. (R.002963-71). The prosecution also asked

the court for leave on redirect, if the defense continued to suggest Emily Yang was coerced to ask her about the portion of her statement where the Defendant told Emily Yang to tell the police she was home with car trouble on the morning of Reuter's murder. (R.002969).

216. While the court cannot make credibility determinations at this stage of the proceedings, regardless of how incredible and unworthy of believability these statements are, the court does not have to accept statements that are contradicted by the record. *Sanders*, 2016 IL 118123, ¶¶ 4243.

217. The record refutes the claims of prosecutor misconduct alleged at paragraphs 15-17 of the unsworn/unnotarized/undated statement purporting to be from Emily Yang found at Exhibit 46a. The record is clear that the prosecution did not speak to Emily Yang except through her attorney. This was represented in open court and was not refuted by Emily Yang's attorney who would have had a clear duty to do so. The record also refutes that Emily Yang was "prepared" by the prosecution for testifying or had any interactions with Emily Yang that were not made through her attorney.

218. Emily Yang's purported recantation of her trial testimony is contradicted by her trial testimony, which is true of all recantations. In this case, however, it was particularly clear that the circumstances surrounding the statement provided by Emily Yang were known to defense counsel and of record. These circumstances were obviously known to Emily Yang's own attorney as well. None of the allegations now made by this witness were raised by her attorney, who would again have a duty to do so. Yet the record refutes that Emily Yang's had any concerns about committing perjury or providing a false statement to police.

219. In addition to being contradicted by the record, the unsworn statements of this witness also contradict each other. In the question/answer interview Emily Yang purportedly gave to defense investigators, found at Exhibit 35, she is asked to speak in her own words about the circumstances of the statement she gave to police. She speaks of psychological pressure and being asked the same question over and over. This statement wasn't salacious enough to support the Defendant's position, because then there exists Exhibit 46a where there now appears numerous other ridiculous details such as the police tearing up her draft statements, writing the statement for her, and being threatened by the prosecutor. Although this statement found at Exhibit 46a is undated, it appears to come after the statement found at Exhibit 35 considering all the new salacious details contained in it.

220. While the court cannot make credibility determinations at this stage of the proceedings, regardless of how incredible and unworthy of belief the statements are, the court does not have to accept statements that are contradicted by the record. *Sanders*, 2016 IL 118123, ¶¶ 4243. In this case, the allegations of the *Brady* violation involving knowingly perjured testimony are contradicted by the record. As the court can observe from the record, the prosecution acted appropriately and in good faith when they questioned Emily Yang at the Defendant's trial.

221. These allegations of subornation of perjury also do not meet the "strict standard of materiality" that would warrant an evidentiary hearing. *Coleman*, 183 Ill.2d 366, 391 (1998); quoting *Agurs*, 427 U.S. at 103. As the prosecution made clear, Emily Yang was called as a witness on a very limited purpose. (R.00901-02). This limited purpose was essentially in support of the People's "Other Acts" motion, regarding the Defendant purportedly getting in the way of Mr. Gayle's relationships with other women by sending them letters. (R.000902).

Emily Yang testified that the Defendant told her how she got into Gayle's e-mail accounts. (R.002959-60). She also testified how the Defendant knew Gayle was seeing other women and how she would send letters to these other women (R.002961-62).

222. This testimony was cumulative to other evidence presented by the State. Julie Fields testified extensively that the Defendant knew about Shaun Gayle seeing other women, and how she had access to his e-mail. (R.2908-34). Fields testified how the Defendant was able to get the named and addresses of the other women Gayle was seeing from his e-mail. (R.002916). Fields also testified that the Defendant told her she posed as another girlfriend of Shaun Gayle and sent emails to the other women in Gayle's contact using the same broken English and made threats to them to deter his other relationships. (R.002918-19).

223. Marguerite (Maggie) Zimmer, testified how the Defendant told her she had access to Shaun Gayle's e-mail and how she knew about the other women he was seeing. (R.002934-46).

224. Christi Paschen testified that the Defendant had accessed Gayle's e-mail and that she had sent letters to the other women Gayle was seeing. (R.003329-32).

225. The records from evidence adduced regarding National Data Research (People's Exhibits 103-105) demonstrated that the Defendant ran background checks on the other women associated with Shaun Gayle. (R.002972-74). The address labels found in the Defendant's residence matched these names and addresses. (R.002994-003011). They also matched the names and addresses found in an unsent form letter found in the Defendant's residence, (People's Exhibit 80A). R.002994-003011). They matched the names and addresses in the letter found in Rhoni Reuter's purse when she was murdered (People's Exhibit 46A). (R.002994-003011).

226. Emily Yang's testimony was cumulative to all this other evidence. There is no reasonable likelihood that her now claimed false testimony could have affected the jury's judgment *See Coleman*, 183 Ill.2d at 391; *citing Agurs*, 427 U.S. at 103.

227. Finally, the Defendant utilizes the two purported statements from Emily Yang found at Exhibits 35 and 42a to advance her claimed alibi as part of her claim of actual innocence. As a threshold matter, this is not "newly discovered evidence" that would not have been available to the Defendant prior to trial with the exercise of due diligence. The Defendant's claimed alibi, that she was home with car trouble, was a fact that would have known to the Defendant prior to her trial. In fact, the Defendant's trial attorneys disclosed the possible affirmative defense of this alibi in their February 17, 2011 answer to discovery, but they abandoned this alibi defense prior to trial for obvious reasons. (C.000571). The fact that Emily Yang would have been home with the Defendant also would have been known to the Defendant. As the law makes clear, evidence is not newly discovered if it presents facts already known to the Defendant though an additional source of those facts may be available. *Barnslater*, 373 Ill.App.3d at 523-524. As the *Barnslater* Court put it "it is the facts comprising that evidence which must be new and undiscovered as of trial, in spite of the exercise of due diligence" *Id.* This is the case even if "the source of those facts may have been unknown, unavailable, or uncooperative." *Id. Barnslater*, 373 Ill.App.3d at 523-524. Consequently, evidence that "does not contain any facts that defendant would not have known at or prior to his trial" is not newly discovered. *Davis*, 382 Ill.App.3d at 712.

228. The fact that Emily Yang was home with the Defendant before she left for school would have been known to the Defendant. It is therefore not “newly discovered evidence” such that can legally support her claim of actual innocence.
229. The fact that the Defendant purchased the swim cap for Emily Yang is a fact that would have been known to the Defendant. This “evidence” is legally insufficient to support her claim of actual innocence.
230. Finally, the evidence from Emily Yang is contradicted by the record. The Defendant was not home with car trouble seeing her children off to school. She was dropping off and paying for her Enterprise rental car in Arlington Heights. (R.003664-72). The Defendant was not at home giving her daughter a swim cap. She was in Wheeling trying to call her son and then in Arlington Heights making a recorded phone calls on her disposable phone to Christi Paschen’s work phone to give her the coded message that she just executed Rhoni Reuter. (R.003561-73); (Petition, Exh. 15). The Defendant’s confession to Christi Paschen and her recorded Denny’s conversation bragging about this murder contradict this claimed alibi as well.
231. Without considering the severe credibility problems with evidence, the evidence is still legally insufficient as it is not of such conclusive character as to justify post-conviction relief. This evidence is not so conclusive that “it is more likely than not that no reasonable juror would find [the defendant] guilty beyond a reasonable doubt.” *People v. Sanders*, 2016 IL 118123 ¶ 47. At its essence, this is evidence that merely contradicts the evidence adduced at trial and is therefore not typically of such conclusive character as to justify postconviction relief. This is evidence which merely contradicts the testimony of the witness at trial, which is not of such a conclusive character to justify post-conviction relief. *Collier*, 387 Ill. App. 3d at 636–37 (when

evidence merely impeaches or contradicts trial testimony, it is not typically of such conclusive character as to justify postconviction relief).

232. On this last point, *Barnslater* is particularly instructive. In that case, the defendant submitted a recantation affidavit of the sexual assault victim who averred that the Defendant did not sexually assault her and that her mother made her implicate the defendant. 373 Ill. App. 3d at 515-16. The court held that this recantation affidavit failed to make a substantial showing of actual innocence as this “recantation affidavit” would merely impeach the witness’s stipulated testimony and evidence “which merely impeaches a witness will typically not be of such conclusive character as to justify postconviction relief.” *Id.* (Internal quotation marks omitted).

233. As the statements of Emily Yang do not constitute newly discovered evidence and are not of such conclusive character as would justify post-conviction relief, the claims concerning this evidence establishing the Defendant’s actual innocence should also be denied.

17. CLAIMS REGARDING ANDREW YANG

234. The Defendant also makes claims regarding her son Andrew Yang, found at paragraphs 84-86 and 133. The Defendant correctly points out that Andrew Yang was not called as a witness at the Defendant’s trial by either the prosecution or the defense, though the defense indicated at one point that they may want to call him as a witness (R.000908).

235. The Defendant claims at paragraph 84 that the police treated Andrew Yang as a suspect. In support they cite to several exhibits.

236. The first Exhibit they cite to is “Exhibit 28” for the proposition that the police put Andrew Yang in a line-up. This Exhibit consists of a police report documenting a witness statement from Carol Kagan where she observed a young man near the victim’s residence on September 30, 2017. (Petition, Exh. 28, Bate stamp 000172). This subject was described as having curly longer black hair wearing a hooded sweatshirt and mirror sunglasses who appeared to look Hispanic. In the second police report, dated December 17, 2007, it documents Carol Kagan being asked to view two photo lineups – one containing Andrew Yang and the other containing a Robert Brooks. (Petition, Exh. 28, Bate stamp 000173). Carol stated that the subject she saw was in neither photo lineup.
237. The fact that the Kagan stated that she did not see the suspect in the photo lineup containing Andrew Yang that she viewed, and that this occurred in December of 2017 before Andrew Yang was even interviewed, it is difficult to see how this Exhibit at all supports the Defendant’s position that Andrew Yang was a suspect.
238. Exhibit 29 is the unsworn/unnotarized statement purporting to be an interview with Andrew Yang. In it, he states that the Defendant was home during the murder, that a gun was stolen from the house in May of 2007, and that this fact came up in a “family meeting” but that Sal Devera wasn’t informed of the gun going missing because he would get mad. (Petition, Exh 29). In the purported statement from Andrew Yang, he also states that the police made him lie and he just told them what they wanted to hear. (Petition, Exh. 29).
239. Finally, Exhibit 30 contains police reports summarizing interviews with Jessie Delgado and Rodolfo Betancourt. In both interviews, it is disclosed that Andrew Yang contacted these individuals to tell them the police were going to be talking to them “everything” and to “tell

the truth.” (Petition, Exh 30). The questions that were asked to both of these individuals concerned Andrew Yang’s mother, the Defendant. The police testified that the only reason they brought up Andrew during her interrogation was when she suggested he had access to the gun, and they clarified with her that they did not consider him a suspect. (R.000055dg). The Defendant was the one that brought up Andrew at all during her interrogation as she tried to justify why the handgun mysteriously disappeared. (R.000055ej-55ek).

240. From these exhibits it is difficult to see how any of this would support the Defendant’s assertion, found at paragraph 86, that the Defendant believed Andrew Yang (and not her) was a suspect or about to be arrested for the murder of Rhoni Reuter. It is obvious the unsworn statement from Andrew Yang, contained at Exhibit 29, even with all its credibility problems, that the police considered the Defendant to be the suspect, even back on January 4, 2008.

241. The Defendant’s claim that the police somehow considered Andrew to be a suspect is also contradicted by the record. She was specifically told during her interrogation on January 4, 2008 that Andrew was not a suspect. (R.000055b). This was also explained to her again during a different part of her interrogation. (R.000055dd-55de). She was also told a third time by the police that they were not interested in Andrew. (R.000055df). It was quite clear during the Defendant’s interrogation, that she was the suspect in the murder of Rhoni Reuter.

242. The information contained in Andrew Yang’s statements is not newly discovered evidence for purposes of establishing an actual innocence claim. This is for the same reasons as the purported evidence from Emily Yang would not be newly discovered evidence. *Barnslater*, 373 Ill.App.3d at 523-524 (evidence is not “newly discovered if it presents facts already known to the Defendant though an additional source of those facts may be available”). Also, this

evidence would not be of such conclusive character that “it is more likely than not that no reasonable juror would find [the defendant] guilty beyond a reasonable doubt.” *People v. Sanders*, 2016 IL 118123 ¶ 47. As stated above with the evidence regarding Emily Yang and the Defendant’s purported alibi, the statement from Andrew Yang that the Defendant was home would merely contradict the substantial amount of evidence adduced at trial that the Defendant was in fact not home that morning. By way of example only, the evidence adduced that the Defendant was dropping off a rental car in the suburbs refutes Andrew Yang’s assertion that she was home with him. This evidence would therefore not be of such conclusive character as to support the Defendant’s claim of actual innocence. *Sanders*, 2016 IL 118123 ¶ 47.

18. CLAIMS INVOLVING BRANDON YANG

243. The Defendant also makes claims in support of her actual innocence concerning her third child, Brandon Yang. This claim is found at paragraph 99. This claim states that Brandon corroborates that the Defendant was home on the morning of October 4, 2007 because he recalls overhearing the Defendant arguing with Emily Yang. This claim is based upon Exhibit 36 of the Defendant’s Petition, an unsworn/unnotarized interview purporting to be with Brandon Yang on January 24, 2019. In this purported interview, Brandon states that he recalls October 4, 2007 and that he recalls his mother was arguing with Emily Yang as he was walking out the door to go to school. (Petition, para. 55).

244. For the same reasons the statements of Emily and Andrew Yang are not newly discovered evidence, this statement would also not be newly discovered evidence. The fact the Defendant

was home would not be “newly discovered” as it would have been known to the Defendant. *Barnslater*, 373 Ill.App.3d at 523-524; *Davis*, 382 Ill.App.3d at 712.

245. This claim would also not be of such conclusive character that “it is more likely than not that no reasonable juror would find [the defendant] guilty beyond a reasonable doubt.” *Sanders*, 2016 IL 118123 ¶ 47. As stated above regarding the claims of Emily and Andrew Yang, evidence that merely contradicts evidence that was adduced at trial is not of such conclusive character as would support a claim of actual innocence. *Sanders*, 2016 IL 118123 ¶¶ 47-52. In this case, the claim the Defendant was home the morning of October 4, 2007 is heavily contradicted by the evidence adduced at trial, the most glaring of which was that the Defendant was dropping off a rental car in the suburbs that morning.

19. CLAIMS REGARDING THE “COLLECTION CALL”

246. The Defendant makes a claim regarding her actual innocence that she was home in the morning on October 4, 2007 because she “received” a collection call on her landline phone. This claim is found at paragraph 101 of the Defendant’s Petition.

247. In support of this claim, the Defendant refers to Exhibits 29, 35, 36, 37, and 38 of her Petition. Exhibits 29, 35, 36, are the unsworn/unnotarized purported interviews of the Defendant’s children previously discussed above. None of these statements refer to this phone call. Exhibit 38 is the written statement of Sal Devira that was previously discussed above. It does not refer to this phone call. Exhibit 37 consists of Bate stamped phone records. The records appear to show a call record for a call at 9:13 a.m., assuming these records are in

central/standard time. The Defendant's remaining assertion that this call was from "a collection agency in New York" is not supported by any evidence contained within the Petition.

248. As an initial matter, this is not newly discovered evidence that can legally support the Defendant's claim of actual innocence. As previously stated, these phone records were provided in discovery. They were known to the Defendant. More importantly, the assertion that the Defendant "received" a call from a collection agency would have also been a fact known to the Defendant prior to trial with the exercise of due diligence. *Barnslater*, 373 Ill.App.3d at 523-524; *Davis*, 382 Ill.App.3d at 712.

249. Additionally, this evidence would not be of such conclusive character that "it is more likely than not that no reasonable juror would find [the defendant] guilty beyond a reasonable doubt." *Sanders*, 2016 IL 118123 ¶ 47. These records certainly do not establish the Defendant was home and received this purported phone call. This purported evidence would also merely contradict other evidence adduced at trial., The Defendant's return trip to Enterprise Rental car in Arlington Heights at 9:21 a.m. contradicts this purported phone record evidence. (R.003664). Also, the evidence that the Defendant was on the recorded phone call made from her disposable cell phone with Paschen at 9:12 a.m. contradicts this claim that the Defendant was answering a collection agency call on her landline phone. (R.003563).

20. CLAIMS INVOLVING CHRISTI PASCHEN

250. The Defendant also makes claims of her actual innocence and a *Brady* concerning Christi Paschen. These claims are found at paragraphs 54-57, 59, and 133. Essentially, the Defendant's claims concern an allegation that Paschen was told she would be charged with murder unless

she told the police about the Defendant's involvement with the crime and that this was not disclosed to the defense. (Petition, para. 55). The Defendant also makes a claim that Paschen was offered some undisclosed deal not to prosecute Paschen if she cooperated with the police. (Petition, para. 133).

251. In support of these claims, the Defendant refers to the unsworn/unnotarized statement of Perry Myers, filed November 14, 2019 as an additional Exhibit to the Petition. In this unsworn/unnotarized statement, Myers claims to recount the "essence" of his purported interview with Christi Paschen on October 24, 2019. (Myers Statement, para. 4).
252. In additions to the objections made regarding this statement being unnotarized and unsworn contained in Section D, above, the People also object on the basis that this entire statement is hearsay and insufficient to support the Defendant's claims at this second stage proceeding. *Velasco*, 2018 IL App (1st) 161683 ¶¶9120; *Walker*, 2015 IL App (1st) 130530, ¶ 25, *citing* *Brown*, 2014 IL App (1st) 122549, ¶ 58.
253. Regarding the purported statement itself, it does not appear that the statements supports the Defendant's claim that Paschen was offered some type of non-prosecution agreement for murder. In the unsworn/unnotarized/hearsay statement describing the "essence" of Paschen's purported interview, it does not articulate that Paschen was made any promises or deals at all regarding her cooperation. At paragraph 11 the statement concludes with "[a]s a result of her cooperation, no charges have been made against her." That isn't a statement supporting any claim Paschen was offered some kind of a detail as the Defendant claims at paragraph 133 of her Petition. This statement is simply the conclusion of the investigator. *Rissley*, 206 Ill.2d at,

412 (“[N]onfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act.”).

254. The hearsay statement involving Paschen’s interview also doesn’t mention any of the allegations found at paragraph 133 of the Defendant’s motion – namely that the prosecution “failed to disclose the state’s agreement with Christi Paschen, hiding the benefits conferred upon her and failing to disclose the state’s agreement not to prosecute her in exchange for her cooperation.” (Petition, para. 134). None of these assertions of fact are found in this statement. The prosecution isn’t even mentioned in the statement, let alone mentioning any agreement made with the State. The Defendant’s supporting documentation simply fails to meet the burden of making a substantial showing of a constitutional violation on that claim.

255. Such a conclusion that Paschen was offered some kind of a deal in exchange for cooperating is also contradicted by the statements she provided to the police that are enclosed as Exhibit 20 of the Defendant’s Petition. The Defendant refers to these statements in Exhibit 20 as proof that “[u]nder extreme pressure, Paschen collapsed, fearing she would be arrested.” (Petition, para. 55). Nothing in the statements found in Exhibit 20 supports this claim. The statements themselves repeatedly refute this claim made at paragraph 55 of the Petition. Notably, the Defendant does not also attach as exhibits or refer to the actual video footage of Christi Paschen’s interviews with police, which are referenced in the multiple “Consent for Electronic Recording” forms also found in Exhibit 20. (Petition, Exh. 20). Although the court may not consider evidence not provided in the Petition or found within the record, it is the Defendant’s burden of proof to support her claims and claims that merely provide conflicting

evidence to that adduced at trial are insufficient to warrant an evidentiary hearing. *See Sanders*, 2016 IL 118123 at ¶52.

256. This conclusion that Paschen was given an undisclosed agreement not to prosecute her is contradicted by her testimony at trial. Paschen testifies that she was afraid she could have been charged with murder because she had helped the Defendant throw away items after the murder. (R.003546). But Paschen also makes clear that she was not made any promises by the police. (R.003547-48). She testified that her motivation to wear the wire was to finally get the truth out and because she felt guilty for not going to the police. (R.003548). Paschen also affirmed the truth and accuracy of the prior statements she made to the police that are attached as Exhibit 20 of the Defendant's Petition. (R.003549).

257. The Defendant also fails to explain what Paschen could have even been prosecuted for. As both the trial court and appellate court noted, Paschen was not an accomplice to the murder. (R.003921-25); *Yang*, 2013 IL App (2d) 110542-U, ¶73. Even if helping the Defendant throw away the disguise on October 4, 2007 after the murder or telling the police the Defendant wasn't at her house could have amounted to Obstruction of Justice as the Defendant's trial attorneys insinuated, this would have been a crime that occurred in a different jurisdiction and was beyond the statute of limitations. (R.003539); (R.003479). There is simply no way Paschen was operating under such an illusory agreement as Defendant suggests. Her subjective impression she was not charged with something she couldn't have been charged with because of her cooperation does not amount to any kind of an agreement. The record contains several examples that Paschen was made no promises of leniency of any kind.

258. The Defendant's assertion that Paschen received some kind of incentive or inducement for testifying was also explored by Defendant's trial counsel at pretrial hearings and at the Defendant's trial. Counsel was obviously aware and questioned officers concerning the circumstances surrounding Paschen talking to the police, including how she was put up in a hotel by the police. (R.000684-92). Defense counsel also was aware and brought out how Paschen was brought before the judge to provide sworn testimony in support of her willingness to cooperate on the body wire authorization. (R.000692-93). It was also brought out during this testimony that Paschen was made no promises of leniency or assurances that she would or would not be charged with any crime in exchange for her cooperation. (R.000721-22). Additionally, at trial defense counsel established that Paschen initially lied to the police when they questioned her back in 2008. (R.003473-75). They questioned Paschen on whether she was charged with a crime in connection with her involvement with the Defendant's disposal of her disguise. (R.003539-40). Counsel even requested a jury instruction regarding accomplice testimony. (R.003922-23). In short, these allegations that Paschen's motivations for cooperating were to avoid being charged with a crime were already advanced and explored at the Defendant's trial. The allegations the Defendant now makes regarding Paschen's cooperation being the product of her fear of being charged with a crime or being threatened with being charged with a crime was made of record at several points in these proceedings and is not "newly discovered" evidence that would support a claim of actual innocence. *See People v. McDonald*, 405 Ill.App.3d 131, 136 (3rd Dist., 2010) (claim that witness was lying during testimony not newly discovered evidence as it was advanced during trial and thoroughly explored during cross examination).

259. More importantly, the claims advanced by the Defendant involving Paschen, even if they were supported by the evidence within the Petition, are not so conclusive such that it is more likely than not that no reasonable jury would find the Defendant guilty beyond a reasonable doubt. *See Sanders* 2016 IL 118123, ¶ 47. It is important to note that nowhere in the unsworn/unnotarized/hearsay statement from the investigator does he claim that Paschen ever recanted what she told the police or the jury about the Defendant's account of murdering Rhoni Reuter. Rather, the hearsay statement, even if considered, would merely add conflicting evidence to evidence the jury already heard and does not meet the threshold of being so conclusive that it is more likely than not that no reasonable juror could be able to find the Defendant guilty beyond a reasonable doubt *Sanders* 2016 IL 118123, ¶ 47.

21. CLAIMS REGARDING RECORDED PHONE CALLS TO DEFENDANT'S PARENTS

260. The Defendant also makes several claims regarding allegedly exculpatory phone calls she made to her parents where she told them she was told by Christi Paschen that her son Andrew Yang was going to be arrested by the police and that she was going to confess to the murder to somehow protect him. These claims are found at paragraphs 63, 65, 68, 74-83.

261. As an initial matter, these claims as they relate to the Defendant's actual innocence must fail because they are not "newly discovered evidence" for purposes of advancing such a claim. The Defendant's intention to falsely confess to murdering Rhoni Reuter would have been a fact obviously known to the Defendant. The fact that the Defendant had a phone conversation with her parents telling them she was told by Paschen that her son had an arrest warrant and

she was going to falsely confess would be a fact also *obviously* known to the Defendant. All of these facts would have been known to the Defendant prior to her trial and therefore do not constitute newly discovered evidence. *Davis*, 382 Ill.App.3d at 712. (if evidence “does not contain any facts that defendant would not have known at or prior to his trial” it is not newly discovered evidence for the purposes of supporting an actual innocence claim.)

262. On this point, *Barnslater* clearly controls. Evidence is not newly discovered when it presents facts already known to a petitioner prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative. 373 Ill.App.3d at 523-524. “It is the facts comprising that evidence which must be new and undiscovered.” *Id.*

263. The Defendant would have known of her intention to falsely confess. The Defendant would have known that she communicated this plan with her parents. Her parents also obviously would have known about this conversation as well. Her parents could have testified about it, assuming the Defendant’s self-serving hearsay would be at all admissible. If there was any dispute about a missing recording or the accuracy of the recoding, that too would have been a fact known to the Defendant. *Davis*, 382 Ill.App.3d at 712.

264. As the record makes clear, the Defendant’s mother did in fact testify on behalf of the Defendant. No testimony regarding this allegedly “exculpatory” phone call and contemplated “false confession” was never adduced during this testimony or even proffered in an offer of proof. (R.003882-86). Perhaps that is because it simply never happened. Regardless, the facts surrounding this entire claim are not newly discovered evidence such that can legally support the Defendant’s actual innocence claim. *Davis*, 382 Ill.App.3d 701, 712.

265. Regarding the conclusiveness of this evidence as it relates to the Defendant's actual innocence claim, this evidence is also not of such conclusive character that it is more likely than not that no reasonable juror could find the Defendant guilty beyond a reasonable doubt. *Sanders* 2016 IL 118123, ¶ 47. The claim of the Defendant's parents, that the Defendant somehow feared her son was going to be arrested and that "falsely confessing" was a means to protect him merely challenges the believability of the Defendant's recorded statements at the Denny's restaurant, as well as her prior statements to Paschen. The Defendant's defense at trial was a similar strategy of challenging the believability of the Defendant's statements, though at trial the defense theory was that the Defendant did *not* know she was being recorded and was simply telling a tall tale. (R.004020-21). This purported evidence merely would advance a different theory challenging the believability of her recorded statements and the believability of the statements she previously told Paschen. The claimed evidence would merely contradict the evidence that was adduced at trial and would not be of such conclusive character that no reasonable juror could find the Defendant guilty beyond a reasonable doubt. *Sanders* 2016 IL 118123, ¶ 47.

266. Regarding the conclusiveness of this evidence, it is important to note what the statements from her parents are not. These are not statements claiming that the Defendant told her parents she knew Christi Paschen was cooperating with the police and that she knew Paschen was wearing a wire. As the identical language in both of these unnotarized/unsworn statements says, the Defendant was going to "meet with Christi and make up a story that she (Marni) shot Ms. Reuter." (Petition, Exh. 26). These statements therefore do nothing to support the Defendant's new story that she knew Paschen was wearing a wire and therefore she decided to

go “falsely confess” directly to Christi Paschen. These statements therefore would merely provide evidence that conflicted with the evidence already adduced at trial that would not be of such conclusive character that would support her claim of actual innocence. *Sanders* 2016 IL 118123, ¶ 47.

267. The fact that the Defendant would have known such an “exculpatory” phone call existed is also fatal to her claim of a *Brady* violation regarding this claimed phone call. If such an “exculpatory” phone call ever existed this fact could have been easily discernable by the Defendant prior to her trial with the exercise of due diligence. *See, Snow*, 2012 IL App (4th) 110415, ¶ 39. No claim was ever made prior to trial that the State failed to provide anything less than all the calls and records of the calls that were recorded. Quite the contrary. The only evidence in the record is that all wiretap recordings and their transcripts were provided to the Defendant.

268. The record shows that the wiretap recordings were tendered on May 13, 2009 as the initial Disclosure to the Accused filed May 13, 2009 indicates. The Defendant’s trial attorneys were provided with 7732 pages of Bate-stamped documents and 77 discs. (C.000039). Of relevance on this issue, were discs 2-5, which contain the wiretap recordings of the conversations between the Defendant and her parents during the time period they allege.

269. The Defendant also acknowledges that these recordings exist and were provided. In the Defendant’s “Motion to Conduct a Forensic Examination and Testing of Audio Evidence In Preparation of a Post Conviction Petition Advancing Marni Yang’s Claims of Actual Innocence,” filed November 19, 2018, the Defendant acknowledges at paragraphs 5 and 6 of this motion that copies of these wiretap recordings were provided to the defense. The

Defendant's complaint made in this motion was that these were "third or fourth generation" copies and that the defense wished to "forensically" examine the original optical discs the recordings were made on a decade earlier.

270. The Defendant refers to Exhibit 21 in support of her claim at paragraph 63 of her Petition that "[a]lthough the phone logs kept by law enforcement show the calls to the Merars were made and recorded, no recording was ever produced." Exhibit 21 does nothing to support this claim, however.

271. Exhibit 21 is the report of her retained expert who attempted to go back and examine the original "Magnetic Optical Disks" used to store the wiretap recordings that were made a decade ago and compare them to the CDs of the recordings that were provided in discovery. (Petition, Exh. 21, pg. 14-16). According to this expert, the Magnetic Optical disks appeared to be empty. (Petition, Exh. 28, pg. 28). The expert went on to examine multiple CDs purporting to contain copies of the recordings. The expert reports that some of the discs displayed an error that "the disk structure is corrupted and unreadable" or were blank and he notes several errors or defects in the logs compared to what was written on the discs. (Petition, Exh. 28, pg. 37). The expert states that, because he was unable to access the magnetic optical discs it is possible there could be evidence of original recordings that were not copied. (Petition, Exh. 21, pg. 38). The expert also offers an opinion that, since he was unable to examine the original optical discs, they were not an authentic representation of what occurred. (Petition, Exh. 21, pg. 58). The expert does state, however that he was able to obtain digital copies of the recordings in relation to his investigation objectives for the February 28th wiretap recordings. (Petition, Exh. 21, pg. 38).

272. First there is nothing in Exhibit 21 that refers to anything that was tendered to the Defendant's trial attorneys a decade ago. The entire report refers to the expert attempting to go through first the original optical discs and then the CDs containing copies of the wiretap recordings. Because the original optical discs were unreadable by the expert some ten years later, the Defendant invites the court to assume the recordings provided to the Defendant in discovery a decade ago did not contain all calls recorded. Exhibit 21 simply does not support this claim.

273. Second, Exhibit 21 also does not support the claim that the wiretap calls between the Defendant and her parents do not exist. In fact, Exhibit 21 refutes this claim. The expert states that he was able to obtain copies of the February 28th recordings. (Petition, Exh. 21, pg. 38). The expert just wasn't able to go back and "forensically analyze" the optical discs some ten years later.

274. This entire expert report would also not be newly discovered evidence. Much like all the other reports of the Defendant's retained experts, this expert's report is simply going back and evaluating the existing evidence available to the Defendant prior to trial. *Patterson*, 192 Ill.2d at 140; *see also Hauad*, 2016 IL App (1st) 150583 ¶¶ 54-55 (a new assessment of previously available evidence does not constitute newly discovered evidence). The Defendant would have known of the existence of any "exculpatory" phone call prior to her trial, since she was the one who made the call. If an expert to conduct a forensic investigation would have been needed to determine if an "exculpatory call" was recorded and wasn't provided, this too could have been done with the exercise of due diligence. Such an investigation would have likely been more fruitful than attempting to review magnetic optical discs a decade later.

275. As a corollary to this last point, the Defendant's claims regarding a *Brady* violation are also forfeited, as they were available to the Defendant prior to trial, they were available for post-trial motions, and they were available as an issue to be raised on appeal. *Tenner*, 206 Ill.2d at 392; *Reyes*, 369 Ill.App.3d 1, 12 (1st Dist., 2006). The Defendant would have known about the existence or nonexistence of this "exculpatory" call and could have raised it as a discovery violation to the court. The Defendant's trial team raised a similar *Brady* violation claim in post-trial motions regarding whether cell tower information was disclosed. (R.004167-68). This claim too could have been raised with the court but was not.

276. The Defendant also refers to the unsworn/unnotarized statements of the Defendant's parents found at Exhibit 26 to support her claim regarding this phone call. In addition to the objections raised above regarding these unsworn/unnotarized documents being legally insufficient to support the Defendant's claims, the claims regarding both parents that "the above conversation, though recorded, was not produced or provided to the defense" are statements that are conclusory and not based upon personal knowledge. *People v. Coleman*, 2012 IL App (4th) 110463 ¶¶52-54 (statements that are not based upon personal knowledge are not "capable of objective independent corroboration") citing *People v. Hodges*, 234 Ill.2d 1, 10 (2009). Again, the Defendant offers no evidence that contradicts the discovery disclosure that all wire tap calls that existed were provided.

277. These statements purporting to be from the Defendant's parents found in Exhibit 26 also claim that the Defendant called them and told them Paschen told her Andrew was going to be arrested. This is self-serving inadmissible hearsay that would not avail the Defendant. *Velasco*,

2018 IL App (1st) 161683) ¶¶9120; *Walker*, 2015 IL App (1st) 130530, ¶ 25, *citing* Brown, 2014 IL App (1st) 122549, ¶ 58.

278. This claim that Paschen told the Defendant Andrew was going to be arrested is also directly contradicted by the record. Paschen's interactions with the Defendant during this period of time prior to the arranged meeting at Denny's were well-documented in her trial testimony. (R.003432-37). The record makes clear that Christi Paschen's calls with the Defendant during this time were also being recorded. (R.003436-37). In fact, Paschen's February 28th call to the Defendant was carefully orchestrated to bring up the Defendant's disposable cell phone and rental car to get the Defendant to discuss those topics in subsequent conversations. (R.003437). This recorded phone conversation was admitted at trial as People's Exhibit 298 and the accompanying transcript was admitted as People's Exhibit 299. (R.003432-36). People's Exhibit 299 is enclosed with this Motion. Nowhere in this recorded phone conversation does Paschen talk about the Defendant's son being arrested. In fact, the Defendant's son does not come up at all. (People's Exhibit 299).

279. The Defendant's Exhibit 27 also does not support the Defendant's claims. In addition to unsworn/unnotarized character of this document, purporting to be some kind of report prepared by an unknown author, the People also object that this document rank hearsay incapable of "objective independent corroboration." *Coleman*, 2012 IL App (4th) 110463 ¶¶52-54 (statements that are not based upon personal knowledge are not "capable of objective independent corroboration") *citing* *Hodges*, 234 Ill.2d at 10.

280. More importantly, this Exhibit 27 refutes the Defendant's claim that some mystery "exculpatory" call was recorded and not provided to the defense. As the Defendant alleges in

paragraph 77 of her Petition, her defense investigators compiled the “actual phone records” of the Defendant and her parents. (Petition, para. 77). The Defendant’s investigators compared the “actual phone records” to the wiretap logs and the actual wireroom recordings. (Petition, para. 77). All the calls shown on the “actual phone records” are contained in the wiretap logs and the wireroom recordings as reflected by Exhibit 27 of the Defendant’s Petition. So, there is no missing call at all, as the Defendant’s parents claim. Recordings exist of all the calls observed in the Defendant’s phone records. (Petition, Exh. 27).

281. This Exhibit 27 also does not support the Defendant’s insinuation that the recordings were edited or tampered with. This document merely claims to note a discrepancy of a few seconds between the phone company logs, (which were curiously not themselves provided), and the recording length listed in the wiretap logs, (which were again also not provided). The Defendant wishes the court to assume that the alleged discrepancies in these records of a few seconds per call is indicative of some *Brady* violation. This purported “report” found at Exhibit 27 simply fails to support this assertion, however. *See Coleman*, 183 Ill.2d at 381 (allegations contained within the Petition must be supported by the record or accompanying affidavits).

282. Furthermore, Exhibit 27 is simply flawed. It appears to compare the length of phone calls as measured by the phone company records, the wire room logs, and the length of the actual recordings. Notably, the column in this chart titled “Call Length” from the phone company records is always listed in *exact minutes* while the column titled “log length” from the wiretap logs and column titled “recording length” from the wiretap recordings themselves lists the calls in minutes and seconds. The “discrepancy” that Defendant alleges is from the difference in these numbers. But these numbers are from different sources that are meant to measure

different things. The phone company records would measure call length for the company's billing practices, and therefore the calls are always rounded up to the next exact minute. The log length and actual recording length would depend on if it were an incoming or outgoing call, if the call was unanswered, if it went to voicemail, etc. The "discrepancy" of a few seconds between these numbers is therefore of no consequence. It hardly supports a claim of a *Brady* violation.

283. The Defendant would appear to have the court believe that all of the Defendant's actual calls were exact to the minute, rather than the obvious conclusion that the phone company records rounded the call lengths up to the next minute and that this is where the "discrepancy" comes from. Regardless, it is the Defendant's burden to support such an allegation with the evidence attached to the Petition, not assumptions and conjecture. *See Rissley*, 206 Ill.2d at 412 ("[N]onfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act."). This ambiguous document enclosed as Exhibit 27 simply does not meet this threshold. *See Coleman*, 183 Ill.2d at 381.

284. To be clear, the *only* information that such an exculpatory phone ever happened comes from the unsworn/unnotarized statements of the Defendant's parents. But even accepting this contention as true for purposes of this stage of the proceedings, this still does not amount to a *Brady* violation. Assuming such a call happened, the Defendant thereafter invites the court to assume that such a conversation was automatically recorded simply because of the wiretap order, and that such a recorded call was willfully suppressed from the Defendant's trial counsel. None of the exhibits attached to the Defendant's Petition support either of these two assumptions. *See Pendleton*, 223 Ill.2d at 473 (burden of proof is on the Defendant to make

a substantial showing of a constitutional violation). The only evidence contained within the record is that the disks, records, and transcripts of all the wiretap recordings existed and were provided to the defense.

22. CLAIMS REGARDING THE DEFENDANT'S "FALSE CONFESSION" TO CHRISTI PASCHEN

285. The essence of the Defendant's Petition regarding her claim of actual innocence is that she now has newly discovered evidence that she was lying to Christi Paschen when she described in detail how she planned for, carried out, and then covered up the murder of Rhoni Reuter. This claim is found at paragraphs 54-73 of the Defendant's Petition.
286. The Defendant's claims that Christi Paschen told her that the police were going to arrest her son Andrew Yang. The Defendant decided that she was going to the police to falsely confess to a crime she didn't commit to protect her son. But the Defendant did not go to the police. She instead went to a Denny's restaurant to meet Christi Paschen on March 1, 2009. At Denny's she somehow observed Paschen was wearing the body wire. Therefore, the Defendant decided at that moment that she was going to "falsely confess" not to the police, but to Paschen directly. She claims that is what the court heard on the March 1, 2009 overhear recording that was played at her trial along with the accompanying transcript. The Defendant claims that she came back to Denny's again on March 2, 2009 to "falsely confess" some more to Christi Paschen, and that is also what the court heard on the March 2, 2009 overhear recording played at her trial, along with the accompanying transcript.

287. As a threshold matter, none of these claims can legally support the Defendant's assertion of actual innocence. This is not newly discovered evidence. These are all facts the Defendant would have known prior to her trial.
288. Again, *Barnslater*, controls. "Evidence is also not newly discovered when it presents facts already known to a petitioner prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative." 373 Ill.App.3d at 523-524.
289. Nobody would have known better than the Defendant herself that she intended to "falsely confess" to the police to protect her son, or that she saw Paschen was wearing a wire, or that she "falsely confessed" to Paschen to protect her son. These were all facts available to the Defendant from the day she was arrested to the day the jury found her guilty three years later at her trial. It is therefore not newly discovered evidence such that can legally support her claim of actual innocence. *Id.*; *Davis*, 382 Ill.App.3d at 712.
290. The Defendant's assertion is based upon exhibits containing the unsworn/unnotarized statements of her parents, her own unsworn polygraph test, the unsworn hearsay interview of Paschen, and heavily edited versions of the audio recordings admitted as evidence at the Defendant's trial. These exhibits will be examined in turn.
291. The only evidence contained within the Petition that the Defendant knew Paschen was wearing a body wire when the Defendant met with her at the Denny's restaurant comes from the Defendant's own unsworn/unnotarized/self-serving hearsay statement contained in her 3-question "polygraph examination" found at Exhibit 41. The People object to the court's consideration of this unsworn/unnotarized/self-serving hearsay statement on all three of these grounds. This entire statement is legally insufficient to support the Defendant's claims at this

stage of the proceedings. *Spivey*, 2017 IL App (2d) 140941, ¶ 17; *Walker*, 2015 IL App (1st) 130530, ¶ 25.

292. Regarding the statements of the Defendant's parents, as argued above, the statements themselves only claim the Defendant was told by Paschen that her son was imminently going to be arrested and therefore the Defendant was going to go make up a statement with Paschen. Nowhere in these statements do her parents claim the Defendant told them that the Defendant knew Paschen was working with the police or that the Defendant was going to go and lie to Paschen directly. These statements do nothing to corroborate the Defendant's claim.

293. The Defendant relies up on Exhibit 22 to support her claim. Exhibit 22 is a CD containing a 51 second audio file entitled "MakingShitUp.mp4." The Defendant relies upon this Exhibit in support of her claim found at paragraph 66 of her Petition that "...Marni had told Paschen that to protect her son she was going to 'make shit up.'"

294. The Defendant's use of this recording found in Exhibit 22 is disingenuous. As the court is aware, the 51 second audio recording found in Exhibit 22 is a selectively edited version of the February 28, 2009 controlled phone call made by Paschen to the Defendant that was admitted at trial as People's Exhibit 298 along with the accompanying transcript, People's Exhibit 299. (R.003432-36). As Paschen stated in her testimony, the topic of this controlled phone conversation was not the Defendant's son. (R.003436-37). The topic of this recorded conversation was the cell phone and the rental car. (R.003437). The stated purpose behind raising this topic was to get the Defendant worked up to start talking about the cell phone and rental car in subsequent conversations. (R.003437).

295. The court may refer to the actual recording admitted at trial as People's Exhibit 298 or the accompanying transcript admitted as People's Exhibit 299 (which is attached) for reference. As the court can observe, the topic of the Defendant's son Andrew is never mentioned during the entire phone call. The Defendant selectively edits the recording at 43 seconds to remove Paschen's words referring to the phone and the car immediately prior to the Defendant's response of "alright we will start making shit up." As the transcript makes clear, Paschen states "I mean I went over everything with them that I could remember but they were *on and on about this phone about the car, I don't know what the hell that is, I don't know so you think about I am to fucking tired to think about it.*" (People's Exhibit 299). The emphasized part of what Paschen stated to the Defendant is what was conveniently edited out of the audio recording found in Exhibit 22 of the Defendant's Petition.

296. The Defendant's claim found at paragraph 66 of her Petition that she "told Paschen that to protect her son she was going to 'make shit up'" is therefore positively rebutted by the record. *See Sanders*, 2016 IL 118123, ¶ 48. While the Defendant may provide a selectively edited version of the People's Exhibit 298 trial exhibit, the complete exhibit itself positively rebuts the Defendant's claim. *See id* at ¶ 45.

297. As the February 28, 2009 controlled phone call makes clear, the Defendant's reference to Paschen obviously referred to coming up with a story to explain away the evidence the police found of the Defendant's disposable phone and rental car. (R.003436-37). This is, in fact, the very same topic of conversation the court heard in the recorded conversation at the Denny's restaurant on March 1, 2009, which was admitted at trial as People's Exhibit 291 with the accompanying transcript admitted as People's Exhibit 289. (R.003441-42).

298. The Defendant again encloses an edited version of this recording, found at Exhibit 23 of her Petition. In this edited version of People's Exhibit 291, the part of the recording enclosed is where Paschen first enters the Denny's restaurant and presumably tells the sever "[t]ell her I'll be right there, I've got to go to the bathroom" and then says, presumably to the recording device "we may have trouble, folks. A piece came out and was hanging down – I don't know if she saw it or not. Hopefully she didn't see the piece." (See People's Exhibit 291 and 289). Paschen goes into the bathroom where the wire is then adjusted. Then Paschen apparently sits down at the table and starts talking to the Defendant. (See People's Exhibit 291 and 289).

299. The Defendant's Exhibit 23 to her Petition edits out everything in the recording prior to these words referenced above. In the actual People's Exhibit 291, the recording starts with Paschen speaking with the police and then driving to the Denny's restaurant. (R.003443). In the actual People's Exhibit 291 recording you can hear Paschen getting out of the car and walking outside and opening the door immediately prior to stating "[t]ell her I'll be right there, I've got to go to the bathroom" (See People's Exhibits 291 and 289). Prior to any of this the Defendant's voice is not heard at all in the recording.

300. Taken as a whole, Paschen's statement near the beginning of the recording that she did not know if the Defendant saw the recording device or not does nothing to support the Defendant's claim. It is apparent from the recording itself that when Paschen said this she had not even started talking to the Defendant at the restaurant yet.

301. As an initial matter, the fact that Christi Paschen stated near the beginning of this recording that the six to eight inch metal box slipped out and was hanging down below her coat was not only contained in the recording but was all discussed in Paschen's trial testimony. (R.003441-

45). This too, is therefore not “newly discovered” evidence upon which the Defendant can legally support a claim of actual innocence. *Barnslater*, 373 Ill.App.3d at 523-524. The Defendant had every opportunity at her trial to advance this claim that she knew she was being recorded. She did not. In fact, her entire trial strategy was the exact opposite.

302. The Defendant’s defense at trial was that the Defendant did *not* know she was being recorded. Her attorneys argued in their opening statement that the Defendant thought she was telling her friend harmless “tall-tales” because she didn’t know she was being recorded. (R.002329-30). This position was again raised in their closing argument when they stated that the Defendant wasn’t taking her statements to Paschen seriously because she didn’t know she was being recorded. (R.4021). The Defendant’s attorneys also represented this position to the court in arguments on their pretrial motions, where they argued that the conversations between the Defendant and Paschen were confidential because the Defendant did not know she was being recorded. (R.001008).

303. The Defendant now wishes this court to believe that the exact opposite was true. The court cannot make a credibility determination regarding this ridiculous assertion at this stage in the proceedings. *See Sanders*, 2016 IL 118123, ¶ 42. And the court need not do so, as this claim is contradicted by the record and would not support the Defendant’s assertion of actual innocence. *See Sanders*, 2016 IL 118123, ¶ 42.

304. The clearest evidence that contradicts the Defendant’s claim that she was providing Paschen with a “false confession” during her recorded conversations comes from the content of the conversations themselves. The content of those conversations can not remotely be considered a “false confession” by any stretch of the imagination.

305. As stated above, when Paschen called the Defendant on February 28, 2009, the topic of the conversation was what the police asked her about. Paschen testified that she was instructed to bring up the disposable cell phone and the rental car to prompt the Defendant to start talking about it in subsequent conversations. (R.003572). When Paschen tells the Defendant about the police questioning concerning the phone and the car, the Defendant tells Paschen “Alright we will start making shit up.” (See People’s Exhibits 298 and 299).

306. This is exactly the topic of conversation in the March 1, 2009 recorded conversation at Denny’s. (See People’s Exhibits 298 and 299). At the very beginning of the conversation, Paschen tells the Defendant the police showed her two papers consisting of a rental car agreement under “Marni Yang” with the car delivered to Paschen’s house and a prepaid cell phone with her work phone number. (People’s Exhibit 289, pg. 3). The Defendant then reassures Paschen telling her if the police had anything substantial they would be coming after the Defendant and not Paschen. (People’s Exhibit 289, pg. 5). Without Paschen providing the Defendant with any more details regarding the rental car or disposable phone, the Defendant states:

Yang: This rental car was the only – what else could there be? (*Redacted*).¹¹ Nobody could identify me driving away from the scene. First of all, what they told you about that rental car being seen near the crime scene, I doubt that very much. I think that was for effect. Okay?

Paschen: Okay.

Yang: (*Redacted*). “A prepaid cell phone,” I said, “I have teenagers in my house.” I said, “Do you want me to tell you how many prepaid cell phones that we’ve gone through in our house in the last couple of years? ‘Cause my kids are losing a phone every freaking week.

¹¹ As the court is aware, these redaction concern conversations the Defendant was having with her attorneys considering the evidence of the disposable cell phone and the rental car. (R.1009-11).

Paschen: Ha. I never realized that.

Yang: Okay? Oh, yeah. They've always had prepaid cell phones. I made the mistake, a couple of years ago, of getting them T-Mobile phones.

(People's Exhibit 289, pg. 5).

307. A moment later, the Defendant brings up the prepaid cell phones and rental agreement again, and without being provided any more information by Paschen, the Defendant states:

Yang: *(Redacted)*. Prepaid cell phones don't keep track of what numbers you call. So how could they have had your work number sitting there?

Paschen: I don't know.

Yang: Did you see it in front of your face?

Paschen: Yes. When he threw it down...

Yang: Mhm

Paschen: ... he had the, the page for the prepaid cell phone.

Yang: Mhm.

Paschen: He said it was bought at Walmart and it was a page attached to the back of it that showed the numbers dialed.

Yang: Okay. **There would have only been two numbers dialed - the rental car place and yours - one quick call to you. Okay?** *(Redacted)*. "Do you know how many, do you know how many prepaid cell phones we've gone through in our house in the last two years?" I can't even keep track of them all.

Paschen: Okay, I don't know. They were just...

Yang: And as far as the rental car goes, *(Redacted)*.

Paschen: Wait, why would you say you rented a car for me? Okay, number one...

Yang: I said, "I don't remember when it was, though." I said, "I don't remember when it was." (Redacted).¹²

Paschen: Why would you put my address? Ooh, okay, thank you.

Denny's Server: Can I get you ladies anything else right now?

Yang: No.

Paschen: No, I think I'm good.

Denny's Server: Okay, you guys need anything just let me know.

Paschen: **Why would you put my address?**

Yang: **'Cause that's where they needed to come pick me up – that's not where I put. That's where they came to pick me up – the rental car place – 'cause that's where I left my car.** So what else did they say?

Paschen: It was like... Frost just looked at me and went, "What, you think I'm going to hand you, on a silver platter, everything we have?" He said, "That's not how this works." He said, "I'm giving you a chance to step up and do what's right. This is your chance - take it or leave it.

Yang: Of course that's what he was going to say. (Redacted).

Paschen: I'm scared, Marni.

Yang: Okay, you're not the only one.

(People's Exhibit 289, pgs. 5-7) (emphasis added).

308. From this beginning excerpt, the court can already conclude that the Defendant isn't "falsely confessing" or even confessing for that matter to anything. Rather, the Defendant is attempting to come up with a story with Paschen to explain away this evidence.

¹² Again, as the court is aware, this redaction refers to the Defendant relaying to Paschen the conversation she was having with her attorney about this. (R.1009-11).

309. What is important to note is that the Defendant knows key details about this evidence without ever being prompted or provided any information by Paschen. Regarding the disposable phone records, for example, the Defendant immediately knows that there would be records of calls she made to the rental car company and Paschen's workplace. She, in fact, refers specifically to the "one quick call to you," which appears to be a reference to the coded call to Paschen's workplace after the Defendant committed the murder.

310. Another example that was highlighted above of the Defendant knowing unprompted details about the evidence was when the Defendant corrects Paschen to tell her she put Paschen's address down as the place she wanted the rental car company to pick her up.

311. The Defendant goes on providing other unprompted details. Paschen asks the Defendant about hiding the gun, and apparently references prior conversations she had with the Defendant. The Defendant appears to know exactly what Paschen is talking about, as the following exchange illustrates:

Paschen: I helped you do something you knew I didn't want any part of. I wish you had listened to me and let the universe do what it was supposed to do. But you wouldn't listen. **When you hid the gun, did you hide it real well?**

Yang: **It's gone. It's gone. It's so far gone, it's... I put it into a bucket of cement. I threw it in a dumpster. Far from my house.**

Paschen: **I thought you were going to put it in the forest preserves?**

Yang: It went into a dumpster and it went to the dump – somewhere in Chicago – wherever they dump. And that was a year ago. They're never going to get it. They don't have the murder weapon.

Paschen: **But, I thought you told me you had it in the forest preserve? You went in and out of the forest preserve.**

Yang: **Right, and when it came to getting rid of it, I didn't feel comfortable dumping it anywhere. There were always too many people around. So I waited until the middle of the night, this was a couple days, it was before they even had time to come. The police were still running in circles looking for the teenager. I put it into a bucket of cement. Okay, incased it [unintelligible]. Put it into a bucket of cement. I took that bucket, like a construction bucket, that's all, and went into a dumpster somewhere behind some stores. The garbage man comes, empties it, takes it to the city dump. It's under tons and tons and tons of Chicago trash. It's gone**

Paschen: Okay.

Yang: Why?

Paschen: I'm just worried.

Yang: Okay. Relax, there's no way they can get that. It's gone.

(People's Exhibit 289, pgs. 7-8) (emphasis added).

312. The Defendant appears to recall her prior conversations with Paschen and provide further unprompted details. The Defendant provides greater detail regarding the bucket of cement a moment later in the conversation where she states:

Yang: Okay? It is, it is gone under a year and a half's worth of Chicago garbage at the city dump.

Paschen: Alright.

Yang: Okay. And, on top of that, it's incased in cement, **in a bucket that looks like a construction bucket. It looks like it came from a construction sight.** That's all.

(People's Exhibit 289, pgs. 9) (emphasis added).

313. The Defendant knew additional details about the rental car agreement. A few moments later, the Defendant explains again that she gave the rental car company Paschen's address so they could come pick her up. For the first time, she mentions the name of the rental car

company which was never provided by Paschen. The Defendant then goes on to start coming up with a potential story with Paschen to explain away this car rental:

Paschen: I'll... I'll... I... first off, I was whigged. I mean, obviously it came to my house.

Yang: Right. Well because of the fact that they picked me up, the, the rental car, they wanted to know what address to come get me. Okay, it's, "**Enterprise: we pick you up.**"

Paschen: Yea, fine...

Yang: So, the point is – number one, it's not illegal to rent a car. I wasn't hiding anything. Okay? I did it with my own credit card and my own driver's license so I wasn't hiding anything. You needed a rental car. I was having problems, you needed to get to work, you needed to get wherever. And you couldn't do it because your credit card is no good; you didn't have enough so that they insist on putting a 250-dollar deposit on your credit card. They hold that there so you couldn't because your credit card was maxed or you couldn't put it on your card – whatever – they wouldn't clear it, so I did it for you. So what? Big deal. You only needed it for a day. Whatever?

Paschen: Fine.

Yang: That's it. That's all.

Paschen: Fine.

(People's Exhibit 289, pg. 10) (emphasis added).

314. Again, this is not a false confession or a confession to anything. The Defendant's inadvertent admissions are rather the product of her trying to work with Paschen to explain away the evidence concerning the disposable phone and the rental car. The Defendant goes on working with Paschen to spin a story about how the Defendant got the rental car for Paschen. She tells Paschen:

Yang: Your company will have a record of it; I guarantee you, they've already done the research and they've, they've verified you that were at work that day. I guarantee you they've already done it. Okay? **So the only gap that needs to be filled in is with the rental car.** I mean, the fact of the matter is... stop shaking.

Paschen: You know this happens. This was – I’ve had since before I met you.

Yang: The fact of the matter is, is that, hey, you know what, you had car problems, you couldn’t get a rental car by yourself ‘cause your credit card was no good. I got one for you, so what? That’s what friends do. That was the day before; that wasn’t the day of. Okay?

Paschen: Mhm. Alright.

Yang: That was the day before. I got the car for you, you know, you drove it around for a day or whatever and then you didn’t need it anymore. Or you can turn around and say, “You know what, I got my, I got my car running and I didn’t need to use it at all. It’s, it parked it in front of my house.” Period.

Paschen: Why did you let me think it was the forest preserve?

Yang: Because prior to... prior to... in the weeks prior to, I was riding around trying to find an ideal spot. Each place that I went I was not comfortable with.

Paschen: I thought you did that then, I didn’t think you did that before.

Yang: No. I used - I spent weeks, weeks, weeks trying to find the perfect spot that wasn’t going to be seen. Okay? I said I did better – I incased it in cement. Huge, big, big, huge bucket. Okay? Incased in cement, waited until after dark, threw it in a dumpster. All over. Behind a Dunkin Donuts somewhere.

Paschen: Okay.

Yang: And [unintelligible]. Oh, goodbye, it’s gone.

Paschen: Okay.

(People’s Exhibit 289, pgs. 14-15) (emphasis added).

315. Contrary to Defendant’s characterization of this evidence, there is nothing in this recorded conversation where the Defendant out right confesses to murdering Rhoni Reuter at all. She rather works with Paschen on coming up with a false story to explain away the evidence of the disposable phone and rental car. The inadvertent admissions and unprompted details that come

out during this conversation, however, contradict the Defendant's claim in her Petition that she was "falsely confessing" to Paschen. The Defendant's unprompted knowledge of details concerning the disposable phone and the rental agreement particularly contradict the Defendant's claim at paragraph 73 of her Petition that she was merely "making shit up." The details the Defendant provides about the disposable phone and rental agreement are things the Defendant could not have simply "made up."

316. Contrary to the Defendant's claim at paragraph 62 of her Petition, the Defendant was not asked anything about the rental car or disposable cell phone during her interrogation back in January of 2008. As the record and the transcripts of the Denny's recordings make clear, the police did not know about this evidence and never asked the Defendant about it. The first time the Defendant is asked about this evidence was during the controlled phone call with Christi Paschen on February 28, 2009. (R.003436-37).

317. The Defendant provides even more unprompted details regarding the rental car and disposable phone in her second recorded conversation with Christi Paschen on March 2, 2009. This recorded conversation was admitted at trial as People's Exhibit 292 with the accompanying transcript being admitted as People's Exhibit 290. In this conversation, the Defendant again works with Paschen to try to explain away the rental car. She tells Paschen:

Yang: If the car was seen leaving the scene of the crime, (Redacted).¹³ Did he describe the car to you?

Paschen: No.

Yang: Because I had gone to rent the car, **the car that they gave me was like a bright fucking blue color. It was like yours. And I was like, "There is no way I'm driving**

¹³ These redactions again refer to the Defendant describing conversations she has with her attorneys regarding the rental car evidence.

this big, fucking, honking blue thing.” So I took it back. And I said, “I need a different vehicle.” And they gave me a black car.

Paschen: Okay.

Yang: Okay. So he didn’t even describe to you the car, really?

Paschen: No, no.

Yang: Um... if it comes up I’m just going to state that the car they originally rented me, there was something wrong with the brakes for making funny noises. I took it back, they gave me another one. That’s all.

(People’s Exhibit 290, pgs. 10-11).

318. In this particular inadvertent admission, the Defendant provides the unprompted details that the first car she rented she returned to the rental car place to exchange for a less conspicuous black vehicle. The Defendant even provides an apt description of the vehicles she rented. These are again details that were not provided to her and her unprompted admissions refute her claim in this Petition that she was “making shit up.” (Petition, para. 73).

319. The Defendant also instructs Paschen again on how to fabricate a story to explain away the rental car. Again, this is quite inconsistent with the characterization of a “false confession.”

The Defendant tells Paschen:

Yang: Anything of substance that he had to try to get you to talk, he put down on the table in front of you. **Car rental agreement - explain it away. You were having car trouble, you needed to get to work, your credit card would not... didn’t have enough credit on it to be able to put the 250-dollar deposit that was required. You asked me for my help, I said, “Sure, no problem.” So I ran over, ran over at lunch time. Okay?**

(People’s Exhibit 290, pg. 12).

320. Finally, regarding this evidence concerning the disposable phone and the rental car, the Defendant tells Paschen:

Yang: **I never expected them to find the car rental. Never expected them to find the cell phone.** (*Redacted*). You got a car rental, you got a prepaid cell phone. Big frickin' deal - what does that mean? Is it a crime to rent a car? My girlfriend needed a car. I rented it for her – she couldn't do it on her own. Big deal? She drove it to work for a day. So what? She drove it to work and back because, you know, whatever. Okay, because hers wasn't, she was having problems with hers.

Paschen: Okay.

Yang: Now they may come forward and say, "Don't you think it's interesting that Marni was having car trouble and so was Christy?" "Hey, you know what, we're not rich like you. We can't afford brand new vehicles that never, you know, break down."

Paschen: Okay.

Yang: Um...

Paschen: It's snowing.

Yang: (*Redacted*).¹⁴ Here's the thing, they can't put the pieces of the puzzle together. That's the problem is for them... they got a theory, they got a hunch, they got a strong hunch... they may be goddamn positive but they can't put the pieces of the puzzle together.

Paschen: Okay.

Yang: Because, if they could put the pieces of the puzzle together, you and I wouldn't be sitting here. **Now, when I bought that prepaid cell phone, I went into Walmart and bought it. I paid cash. I took it, it was a prepaid – took it right off the shelf. I paid cash. And when you buy a prepaid cell phone like that, you have to go online to activate it – there's a website that you have to go to activate it. I activated it from an internet café somewhere with no video cameras. I did not register it under a name. Let me ask you a question: when you saw that call list, did it have my name on it?**

Paschen: I don't recall seeing a name.

Yang: Okay.

Paschen: But I saw four phone numbers.

Yang: Mhm.

¹⁴ In this redaction the Defendant is again referring to a conversation she had with her attorney concerning this evidence.

Paschen: There was four... four entries – that was it.

Yang: Okay. **One would have been your work number and the other two were probably, um, the car rental place. There were two or three probably to the rental place.**

Paschen: Okay.

Yang: That's it. That's it. Okay? **That phone is not registered to me. It's not registered to me. It's not registered to anybody.** I'm curious to know how they got the call log. That kind of stumps me because I was under the impression that you can't trace, the track phones don't keep track of that stuff, but...

Paschen: I don't know.

(People's Exhibit 290, pg. 13).

321. Again, the Defendant provides unprompted key details concerning this evidence which are inconsistent with her claim that she was simply “making shit up.” These details were obviously corroborated at her trial by the evidence itself.

322. Finally, the Defendant mentions this evidence one more time during her conversation with Paschen on how to explain it away. The Defendant tells Paschen:

Yang: *(Redacted)*.¹⁵ Um...was there anything that you noticed about the car rental agreement?

Paschen: No, not really.

Yang: My signature... was my signature....

Paschen: It wasn't in front of me that long, Marni. I mean, it was there long enough to see the name... to see my address.

Yang: Mhm.

Paschen: And then it was off the table. So I don't know.

¹⁵ This redaction again concerns the Defendant referencing a conversation with her attorney about this evidence.

Yang: Okay. **'Cause the only thing that I'm going to need to fill in the blank on is what time the car was returned, which I don't remember... okay? It was pretty much right away.** Um... and I think it's that that explanation is very simple. You, um, you had taken, that you had taken the vehicle the night before to run some errands, but that you didn't need it the next day because you got your car started. So, I took the liberty, because you were stuck at work, I took the liberty of getting out to your place and returning the car for you so that you wouldn't be charged for another day. Gotta have it back by noon. If you rent it by noon, you gotta have it back by noon the next day.

Paschen: Okay.

Yang: Okay. **And my phone call to your work from that prepaid cell phone was just simply to let you know that I was gonna go return the car for you. They can not dispute it.** There's... they, they have something that they think they can sink their teeth into, but they can't quite figure out which way to bite into it. Okay? Um...(Redacted).

Paschen: Okay. Well, I'm going to eat, and drink...

(People's Exhibit 290, pg. 14-15).

323. Again, the Defendant provides unprompted key details regarding the rental car and disposable phone as she attempts to work with Paschen on crafting a story to explain away this evidence. This is completely inconsistent with the Defendant's claim she was "falsely confessing" to Paschen. Rather, she was attempting to make up a false story about the rental car and the disposable phone.

324. Taken as a whole, the Defendant's characterization of these two recorded conversations at the Denny's restaurant as a "false confession" is contradicted by the evidence itself. The conversations are inconsistent with being labeled a "false confession" and are completely consistent with the Defendant telling Paschen in her February 28, 2009 phone call that they would "make shit up" about the disposable phone and the rental car come up with an

explanation about it. The unprompted key details the Defendant provides about this evidence is corroborated by the actual evidence that was adduced at trial.

325. The record contradicts the Defendant's claim that she gave a false confession in one more critical respect. Namely, the fact that the details the Defendant provided on how she killed Rhoni Reuter were the same details that Christi Paschen told the police days earlier. The Defendant could not have known about these details. The Defendant could not have guessed them, and she could not have "made shit up" that just so happened to exactly match what Paschen previously told the police.

326. Paschen's trial testimony contains many of the details she has provided to police prior to meeting with the Defendant at Denny's. Paschen testified that she spoke to the police on February 27th, February 28th, March 1st, and March 2nd, 2009. (R.003419). She wrote three statements for the police documenting the details she recalled about what Defendant told her. (R.003548).

327. Regarding Paschen's testimony concerning her February 27, 2009 statement, Paschen told the police specifically how the Defendant described to her how she first encountered Rhoni Reuter the morning of her murder and how she went about shooting Reuter. (R.3553). Paschen told the police that the Defendant said to her that when Rhoni Reuter opened the door she saw the Defendant standing there, opened her mouth to scream, and that's when the Defendant said she started shooting at Reuter. (R.003552). Paschen wrote in her statement that the Defendant told her she felt she had to move forward because there was no way out at that point, so she just started shooting. (R.003552-53).

328. Paschen also testified that she told the police in her February 27, 2009 signed statement how the Defendant previously described Reuter falling backwards to the ground as the Defendant continued to shoot, and that she had to push or kick Reuter's foot away in order to close the door after the shooting. (R.003555). Paschen also told previously told the police in her prior statement that the Defendant had told her that the apartment was dark, and she couldn't see what part of Rhoni Reuter's body she had struck. (R.003552).
329. Paschen told the police on February 27, 2009 how the Defendant stated she was in disguise when she shot Reuter. (R.003549). She also told the police that the Defendant stated she wore a wig. (R.003550). Paschen also told police how the Defendant observed an ultrasound photograph on the refrigerator in Reuter's apartment. (R.003550). Finally, Paschen previously told the police how the Defendant dumped the disguise she was wearing in a metal bin after the murder. (R.003552).
330. In addition to Paschen's testimony regarding her prior statements to the police, the Defendant enclosed Paschen's actual written statements, found at Exhibit 20 of the Defendant's Petition. The court should consider this evidence, as it completely contradicts the Defendant's claim that she "falsely confessed." The record is clear that the Defendant was unaware Paschen had provided these statements to the police. There was no way Christi Paschen could have provided the details in her statements on February 27, 2009 and February 28, 2009, that the Defendant could simply "make up" in the recorded Denny's conversations. The comparison chart attached to this motion as **Exhibit A** illustrates this point. This comparison chart compares the exact quotes from Paschen's February 27, 2009 and February 28, 2009 statements found at Exhibit 20 of the Defendant's Petition to the transcripts of the

recorded Denny's restaurant conversations admitted at trial as People's Exhibits 289 and 290. As the court can clearly observe, in her February 27, 2009 and February 28, 2009 the statements Paschen gives provides several key details surrounding the Defendant's previous account of the murder that the Defendant recites almost verbatim in their recorded conversations at the Denny's on March 1, 2009 and March 2, 2009. They provide the same account of the disguise the Defendant was wearing, the same account of the rental car, the same account of how Reuter started screaming, how the apartment was dark, how the Defendant kicks Reuter's leg, how the Defendant drove back to Paschen's house after the murder before returning the rental car, how the Defendant made the coded call to Paschen afterwards, how the Defendant used fake license plates on the rental car, and how the Defendant buried the gun in a bucket of cement. (See **Exhibit A**).

331. The Defendant's statements to Paschen were corroborated by other evidence adduced at the trial. Paschen recounted to police that the Defendant previously told her about Reuter having an ultrasound photograph on the refrigerator. That was true. (R.002561-62). The Defendant told Paschen at Denny's about having to take the first rental car back to exchange it for a less conspicuous black rental car. That was also true. (R.0003646-72). Paschen referred to the Defendant throwing away a bag of gun grips. Testimony corroborated the existence of these gun grips. (R.003076-84). Paschen referred to the coded call where the Defendant called her on the disposable phone to ask her to dinner as the signal that she murdered Reuter. That call existed and was played for the jury as People's Exhibit 293. (R.003370-73). As the prosecutor put it describing this call in closing arguments "[e]ven if you had no idea of the context of this call, you can hear just from the way that the words are spoken and from the

pauses in the conversation that something is going on.” (R.003967-68). Paschen’s account of the medical alert bracelet also corroborated her statement. (R.003576). But even ignoring the medical alert bracelet, Paschen’s account of the Defendant’s statements concerning the murder were corroborated in multiple ways. This too, positively rebuts the Defendant’s claim that her recorded statements to Paschen were a “false confession.”

332. The record, and the Defendant’s own attached exhibits to her Petition thoroughly contradict the Defendant’s claim that the Defendant’s recorded words to Christi Paschen on March 1, 2009 and March 2, 2009 was a “false confession.”. A claim that is contradicted by the record merely adds conflicting evidence to the evidence that was adduced at trial and is not of such conclusive character that it is more likely than not no reasonable juror would find the Defendant guilty beyond a reasonable doubt. *Sanders*, 2016 IL 118123 ¶¶ 47-53; *see also Collier*, 387 Ill. App. 3d at 636–37 (evidence that merely contradicts the evidence adduced at trial is not typically of such conclusive character as to justify postconviction relief).

333. The Defendant’s remaining claims regarding her statements being untrue were the same arguments her trial attorneys advanced at her trial. They are found at paragraphs 69-72 of the Defendant’s Petition. These are not newly discovered evidence as they are arguments concerning the evidence adduced at trial. These claims therefore cannot legally support the Defendant’s actual innocence.

334. The Defendant first argues that her statement wasn’t true because she said Reuter fell backward, hitting the countertop, and then falling *back* on the floor. (Petition, para. 69). The exact quote the Defendant loosely refers to in her Petition is this:

Paschen: What did you see?

Yang: All I saw was... everything was in shadows, the kitchen was dark. Okay? In fact, it was so dark I wasn't even positive that I was making straight shots. Okay? Didn't even, didn't.... she, she opened up the door and all she saw was a dark-skinned person with sunglasses holding a gun like this. With a hoodie on, okay? And... she started screaming. I took the first shot. I remember screaming. 'Cause at that point I realized we are now at the point of no return. Okay? Any thoughts that we had about turning back – we gotta finish this now. And I just started emptying the clip. **Um...She went, cause she had already started to come out of the apartment, she went backwards into the kitchen. Fell against the counter, fell against a counter, with the floor and it was all in shadows. It was all in shadows.**

(People's Exhibit 290, pg. 20)

335. The Defendant's trial attorneys made this same argument at trial, arguing in their closing that the Defendant said the victim fell on her back. (R.004021-22). Contrary to the Defendant's arguments of Defendant's trial attorneys and her regurgitation of this argument at paragraph 70 of the Petition, the Defendant never says Rhoni fell on her back.
336. The Defendant makes the claim at paragraph 72 that the Defendant's statement was false because she wouldn't have needed to kick Reuter's foot to close the kitchen door. (Petition, para. 72). This is, again, not newly discovered evidence. The Defendant vaguely cites to "photographs of the crime scene" without attaching the photographs she refers to or referring to the admitted trial exhibits. This claim is therefore not supported by the documents attached to the Petition and is legally insufficient.
337. At paragraph 71 of the Defendant's Petition, the Defendant vaguely cites to the edited version of People's Exhibit 292 that she attaches to her Petition as Exhibit 24. Any of the argued inconsistencies between what the Defendant told Paschen in the recording to what the evidence showed, if they can truly be called inconsistencies, are not newly discovered evidence. This was evidence already presented at the Defendant's trial and any inconsistencies

were put to the jury to resolve. This evidence too can therefore not support the Defendant's claim of actual innocence.

23. CLAIMS REGARDING THE SUFFICIENCY OF THE EVIDENCE

338. The Defendant also makes numerous throughout the Petition that appear merely to challenge the sufficiency of the evidence adduced at her trial. These claims are found at paragraphs 53, and 136-158.

339. At paragraph 53 of the Defendant's Petition, she refers to "post-trial interviews with jurors" and the claim that these jurors found the evidence of the Defendant's recorded conversations to be the critical evidence in the case. This claim is flawed for several reasons.

340. First, the Defendant provides no evidence of this assertion. The claim is not supported by anything. It is therefore legally insufficient on that basis alone.

341. Second, and more importantly, the Defendant ignores the purpose of these current post-conviction proceedings. The purpose of this post-conviction proceedings is not to retry the Defendant. The Defendant had her trial. She was found guilty beyond a reasonable doubt. Her conviction was affirmed on appeal. The purpose of this proceeding and of her constitutional claim of actual innocence, is to demonstrate "total vindication" or "exoneration," not to merely challenge the sufficiency of the evidence adduced at her trial. *Adams*, 2013 IL App (1st) 111081, ¶ 36 Her burden is therefore to not present a reasonable doubt, but rather to establish, more likely than not, that no reasonable juror could find her guilty beyond a reasonable doubt based upon evidence that is newly discovered and could not have been discovered prior to her trial with the exercise of due diligence. *Sanders*, 2016 IL 118123 ¶¶ 47-53.

342. The claims the Defendant therefore makes at paragraphs 136-160 concerning the police investigation, Shaun Gayle's alibi, the conflicting trial evidence, etc. do not present the court with any evidence that can be considered "newly discovered" for purposes of legally supporting the Defendant's claim of actual innocence.

24. CLAIMS REGARDING THE I.P. ADDRESS OF THE DEFENDANT'S E-MAIL

343. The Defendant also advances a claim that she is actually innocent because she claims the e-mail, she sent to her workplace was from the I.P. address of her home computer. She asserts that this proves she did not go over to Christi Paschen's house the night before the murder. This claim is found at paragraphs 87-97 and 133 of the Defendant's Petition.

344. As an initial matter, this is not newly discovered evidence. The Defendant's entire "evidence" regarding this claim, found at Exhibit 31 is contained in the discovery tendered to the defense before trial. Curiously, the Defendant places the Exhibit sticker of "Defendant's Exhibit 31" directly over the Bate stamped page numbers of some of the pages attached to this Exhibit, but the first page of the Exhibit is Bate stamped 003076, the second page of the Exhibit is found at Bate stamped page 003079, the third page is visibly 003078, the fourth page is Bate stamped 003080, and the last page is Bate stamped 006852. Regardless, the I.P. address in question was provided to the defense and the claim that this I.P. address was from the Defendant's home would not be evidence that was unavailable at the time of the Defendant's trial that could not have been discovered earlier through the exercise of due diligence. *Harris*, 206 Ill.2d at 301 (2002). This evidence therefore is legally insufficient to support the Defendant's claim of actual innocence.

345. The Defendant's claimed assertion that this e-mail was sent from the Defendant's home I.P. address is also not material to the Defendant's claim of actual innocence and is of not such conclusive character that it is more likely than not no reasonable juror would find the Defendant guilty beyond a reasonable doubt. *Sanders*, 2016 IL 118123 ¶ 47.

346. Contrary to the Defendant's assertion at paragraph 133 of her Petition, during the Defendant's trial, the prosecution never argued where the Defendant sent the e-mail from. They simply argued that the Defendant sent the e-mail after leaving Gayle's residence and then she went to Paschen's house. (R.004049-50). The Defendant's trial attorneys also didn't argue to the jury that the Defendant sent the e-mail from her Blackberry. The reference the Defendant refers to at paragraph 93 of her Petition was the defendant's attorney stating during a sidebar discussion his good faith basis to ask the witness (Zimmer) if she knew where the Defendant sent the e-mail from. (R.002956). Contrary to the Defendant's insinuation, the location where the Defendant sent this e-mail was never alleged during the Defendant's trial. The relevant issue during the Defendant's trial was *when* the Defendant sent e-mail and why she sent the e-mail to her workplace the night before but waited until approximately 10:00 a.m. the next morning to contact her ex-boyfriend to help her change the battery. (R.003089-91). That was the false alibi the prosecution alleged the Defendant attempted to create. (R.004049-50).

347. It is clear from the record that neither Shaun Gayle nor Christi Paschen are very clear on the time the Defendant is coming and going. Gayle responds affirmatively to the leading question that the Defendant left "at around 9:30 p.m. or so" on the evening of October 3, 2007. (R.002840). Paschen's testimony regarding when the Defendant arrived at her residence was

that “[s]he got there late. It was somewhere around 9:00, 9:30, maybe a little bit later.” (R.003348).

348. It is also clear from the record that both the Defendant and Shaun Gayle lived in Chicago and that Christi Paschen lived in Arlington Heights. (R.002127-32).

349. Assuming that the Defendant’s claim that the e-mail she sent to work came from her home computer, and assuming that the Defendant didn’t set this e-mail to send on a delay, this fact does nothing to provide the Defendant with an alibi as the Defendant argues. The Defendant does not explain anywhere in her Petition why she could not just stop at home, send the e-mail, and then go to Paschen’s house, arriving “maybe a little bit later” than 9:30. (R.003348). The Defendant simply asserts with no explanation that “[t]he IP address additionally refutes Christi Paschen’s claim that Marni spent the night at her house.” (Petition, para. 97). It does no such thing. This is a conclusory statement that is not supported by the evidence contained within the Defendant’s Petition. *See Rissley*, 206 Ill.2d at 412 (“[N]onfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act.”).

350. As stated above, assuming this assertion is true, it is not evidence of such conclusive character that would “exonerate” or “vindicate” the Defendant, as it was entirely possible for the Defendant to send this e-mail from home (or have it delay sent from home) and still go to Paschen’s house. *Collier*, 387 Ill. App. 3d at 636–37. This is actually plausible considering other aspect’s of the Defendant’s plan. The Defendant’s plan involved the purchase of a disposable phone that the Defendant believed was untraceable. (See People’s Exhibit 290, pg. 13). It would make very little sense for the Defendant to purchase this “untraceable” phone only to spoil her plan by bringing her own personal phone with her while she committed the

murder. It would have therefore been prudent for the Defendant to stop at home to leave her own traceable cellphone behind.

351. The claim that this I.P. address evidence provides an alibi for the Defendant would also contradict other evidence adduced in the trial and therefore would also not be of such conclusive character is to support the Defendant's actual innocence. By way of example only, the most obvious of this evidence would be the fact that the Defendant was dropping off a rental car at Enterprise in Arlington Heights the same morning she claims she's home with car trouble. (R.003660-64). This I.P. address evidence therefore would merely contradict other evidence in the case and not be of such conclusive character as to be legally sufficient to support the Defendant actual innocence. *Sanders*, 2016 IL 118123 ¶¶ 47-53.

25. CLAIMS REGARDING POLYGRAPH EXAMINATIONS

352. The Defendant also claims she is actually innocent because of the "evidence" provided by her retained polygrapher. These claims are found at paragraphs 76, 105, 107-108.

353. This evidence consists of short leading questions with yes or no responses purporting to contain the statements of witnesses. The People raised the objection above to the unsworn/unnotarized/self-serving hearsay contained in these "polygraph" interviews. In addition, the People object to this evidence based upon the character of this purported evidence. The law is clearly established that polygraph evidence is generally inadmissible in Illinois. *People v. Baynes*, 88 Ill. 2d 225, 240 (1981). More specifically, Illinois has a firmly established rule against the introduction of the details of the results of polygraph examinations. *People v. Lewis*, 269 Ill. App. 3d 523, 527, (4th Dist., 1995). Polygraph evidence does not have sufficient

reliability for admission, and if it is admitted, it is likely to be taken not merely as reliable, but as completely determinative of guilt or innocence. *People v. Gard*, 158 Ill. 2d 191, 201 (1994). Moreover, the supreme court has stated that its “overriding concern . . . is the preservation of the integrity of the judicial process.” *People v. Jackson*, 202 Ill. 2d 361, 369 (2002). Polygraph evidence runs the high risk of usurping the fact-finding role of the trial court or jury, and the supreme court has held that it can be plain error. *Gard*, 158 Ill. 2d at 205, (plain error requiring reversal when evidence of polygraph testing of witnesses was presented at trial); *Baynes*, 88 Ill. 2d at 230-31 (reversing despite the fact that the evidence was not closely balanced because stipulation to polygraph evidence by the parties impinged on the integrity of the judicial process). This evidence would be therefore legally insufficient to support the Defendant’s claims asserted in this Petition.

354. These polygraph examinations are also not “newly discovered” evidence. As discussed above, the facts presented by all of these witnesses would have been known to the Defendant prior to her trial. Simply tacking on a polygraph examination does not make this evidence new. Like all of the Defendant’s “expert” witnesses, this polygrapher is merely providing an assessment of previously available witnesses and is therefore providing no new evidence that can legally support the Defendant’s actual innocence claim. *Patterson*, 192 Ill.2d 93, 140 (2000); *see also. Hauad*, 2016 IL App (1st) 150583 ¶ 54-55 (a new assessment of previously available evidence does not constitute newly discovered evidence).

355. This polygraph evidence is also not conclusive character that it is more likely than not no reasonable juror would find the Defendant guilty beyond a reasonable doubt. *Sanders*, 2016 IL

118123 ¶ 47. This evidence would frankly be of no influence on a jury whatsoever as it would be completely inadmissible.

356. It is understandable that the Defendant would seek to bolster the statements of her parents, her children, and her own statements made now some eight years after her trial as they may not appear to be at all believable. Unfortunately, the addition of the Defendant's retained polygrapher and the methods he provides does nothing to bolster either the legal sufficiency or the believability of this evidence.

26. CLAIMS REGARDING JESSIE DELGADO

357. The Defendant also claims newly discovered evidence and a *Brady* violation in conjunction with a purported interview with a Jessie Delgado. These claims are found at paragraphs 21-26 of the Defendant's Petition.

358. The Defendant's claim is that this Delgado stole the Defendant's Beretta 9mm in May of 2007, and that he told the police about this when they interviewed him in 2008 in conjunction with this case. The police then lied in their police reports and never mentioned Delgado's apparent confession to stealing the Defendant's Beretta 9mm.

359. In support of this claim, the Defendant cites to Exhibits 6 and 7 of the Defendant's Petition. Exhibit 6 is the police report mentioning Delgado from January 5, 2008. Exhibit 7 purports to be an affidavit from Jessie Delgado where he makes the claims listed above. This affidavit appears to be unnotarized and unsworn to. It also appears to be undated, so there is no way of knowing when this evidence became available to the Defendant. On these grounds, the People

object to the court's consideration of this document. *Allen*, 2015 IL 113135, ¶ 34-35, *Spivey*, 2017 IL App (2d) 140941, ¶ 17; *Velasco*, 2018 IL App (1st) 161683) ¶¶98-104.

360. This statement found at Exhibit 6 also does not constitute newly discovered evidence that would not have been available prior to the Defendant's trial with the exercise of due diligence as is required to support a claim of actual innocence. First, the fact the Defendant claimed this handgun was stolen by a friend of her children was a fact already known to the Defendant and apparently known to her children prior to her trial. *Barnslater*, 373 Ill.App.3d at 523-524. Second, there is nothing to suggest this witness was not available to the defense with the exercise of due diligence.

361. This evidence is also not of a conclusive character as would support the Defendant's claim of actual innocence. The fact that the Defendant's 9mm Beretta was stolen prior to the murder certainly does not exonerate or vindicate the Defendant. It would merely put the prosecution in the same posture as if no evidence was found that the Defendant owned a 9mm handgun. That certainly doesn't mean the Defendant could not have acquired a 9mm handgun to commit the murder. Additionally, the Defendant's statements to Paschen and her own recorded statements demonstrate the Defendant possessed a handgun that she used to murder Rhoni Reuter and then the Defendant disposed of this handgun. Therefore, this statement purporting to be from Delgado merely contradicts the evidence adduced at trial and would not be of such conclusive character that it would be more likely than not no reasonable juror could find the Defendant guilty beyond a reasonable doubt. *Sanders*, 2016 IL 118123 ¶¶ 47-53.

362. The Defendant's claimed *Brady* violation should also be denied based upon the same analysis. The evidence of the Defendant's guilt was overwhelming. *Beaman*, 229 Ill.2d at 77

(the materiality of the undisclosed evidence must be evaluated by also considering the strength of the evidence presented at trial). The particular evidence challenged by Delgado's statement, that the Defendant owned a 9mm handgun, was not material to the Defendant's guilt in this case. When faced with the strength of all of the other evidence against the Defendant, the fact that the prosecution couldn't prove the Defendant owned a 9mm handgun would not have affected the outcome, and there is no reasonable probability the result of the proceeding would have been different had this claimed evidence been disclosed. *Beaman*, 229 Ill.2d at 74, (citing *Harris*, 206 Ill.2d at 311).

VI. CONCLUSION


The People request that the Defendant's Petition be dismissed as it does not meet the legal requirements of establishing a claim of actual innocence or of establishing any other violation of the Defendant's constitutional rights. The Defendant's claims that are based upon expert evaluations of previously available evidence, statements of witnesses concerning facts that would have been previously known to the Defendant, and witnesses or evidence that were previously available to the Defendant with the exercise of due diligence cannot legally support the Defendant's assertion of actual innocence. The Defendant's claims which are rebutted by and merely contradict the evidence adduced at trial are also legally insufficient to support the Defendant's assertion of actual innocence. If the court should determine an evidentiary hearing is warranted on some of the issues raised within the Petition, however, the People request that the court hold an evidentiary hearing focused solely upon those specific issues and dismiss the remaining claims of the Petition for the reasons stated above. *Lara*, 317 Ill.App.3d at 908

(partial dismissal of post-conviction claims permitted at second stage); *Mitchell*, 2012 IL App (1st) ¶72 (same).

WHEREFORE, the People of the State of Illinois request that this Honorable Court grant the People's Motion to Dismiss the Defendant's Petition.

Respectfully submitted,

MICHAEL G. Nerheim
State's Attorney of Lake County



Jason R. Humke
Assistant State's Attorney

PEOPLE'S EXHIBIT A

2/27/09: Marni said she put on a pair of sweat pants and sweat shirt, a black wig and disguised her face with make-up	3/2/09 - Yang: She opened up the door to the apartment. Okay? I was in. I had a wig on. I had dark sunglasses this big covering my face. ...I had a hoodie on. Okay? I had dark makeup on my face and I had gloves on. (People's Exhibit 290, pg. 5)
2/27/09: She said she drove a car that she had rented and paid for with cash to the victim's apartment complex	3/2/09 - Yang: Because I had gone to rent the car, the car that they gave me was like a bright fucking blue color. It was like yours. And I was like, "There is no way I'm driving this big, fucking, honking blue thing." So I took it back. And I said, "I need a different vehicle." And they gave me a black car. ... What I'm telling you is that right now I am scared to death because I never expected them to come up with the car rental. (People's Exhibit 290, pg. 10)
2/27/09: Marni told me that she entered Rhoni's apartment building and waited in the hallway outside Rhoni's front door. Marni said she was about to leave the building when Rhoni opened the front door. She said Rhoni appeared surprised and opened her mouth as if to scream as she looked directly at her. Without thinking, Marni began shooting at Rhoni as Rhoni attempted to close the front door.	3/2/09 - Yang: When... when... when she opened up the door, that's when I, that's when I brought out the gun. And when she saw it she started screaming, and I just let her have it. I just let her have it. (People's Exhibit 290, pg. 5)
2/27/09: Marni said that the apartment was dark, and she couldn't see what part of Rhoni's body she had struck	3/2/09 - Yang: Mhm, it was dark. I didn't touch anything. I took maybe two steps and I took... Paschen: What did you see? Yang: All I saw was... everything was in shadows, the kitchen was dark. Okay? In fact, it was so dark I wasn't even positive that I was making straight shots. Okay? Didn't even, didn't.... she, she opened up the door and all she saw was a dark-skinned person with sunglasses holding a gun like this. With a hoodie on, okay? And... she started screaming. I took the first shot. I remember screaming. 'Cause at that point I realized we are now at the point of no return. Okay? Any thoughts that we had about turning back - we gotta finish this now. And I just started emptying the clip. Um...She went, cause she had already started to come out of the apartment, she went backwards into the kitchen. Fell against the counter, fell against a counter, with the floor and it was all in shadows. It was all in shadows. (People's Exhibit 290, pg. 23)
2/27/09: Marni said she had to push or kick the foot or leg of Rhoni out of the way so she could close the door	3/2/09 - Yang: I just, I, took one last shot, in the head - finished her off. And I took off. Oh, I closed - I had gloves on - closed the door behind me. Her leg was sticking out into the hallway; I had to kick it inside. Then I slammed the door; took off. (People's Exhibit 290, pg. 24)

<p>2/27/09: Marni said that she drove back to my house and changed out of her disguise and threw the clothes and wig in a metal bin</p>	<p>3/2/09 - Paschen: ... was.... okay. You dumped the wig ... Yang: We dumped everything. Paschen: ... I take it you still had the wig and the, and the, the glasses and the, and makeup on? Yang: I was half way to your house before I got, before I took it off. Paschen: Okay, so you were quite a distance away then? Yang: Yea, I was half way to your house before I took the wig off. (People's Exhibit 290, pg. 2)</p>
<p>2/28/09- On Wednesday October 3, 2007 ...Marni...told me that if she carried out the murder, she would contact me in the morning and ask me if I wanted to have dinner as a code that meant that she had killed Rhoni. On October 4, 2007....Shortly after I arrived at work, I received a call from Marni who asked me to have dinner with her that night, shortly after that, Marni asked if I was okay and I knew she meant about what she had done.</p>	<p>3/1/09 - Paschen: ... he had the, the page for the prepaid cell phone. Yang: Mhm. Paschen: He said it was bought at Walmart and it was a page attached to the back of it that showed the numbers dialed. Yang: Okay. There would have only been two numbers dialed - the rental car place and yours - one quick call to you. Okay? (People's Exhibit 289, pg. 6)</p>
<p>2/28/09 – Marni went to the dumpster by the Steak and Shake which was surrounded by some type of fence and Marni threw a pair of license plates in the dumpster. Marni told me that she stole the plates from a car in a parking lot and had put them on the car she drove to the murder.</p>	<p>3/2/09 - Yang: Don't forget the plates that were on that car are not even registered to that vehicle. They were plates that I found somewhere – laying on the ground someplace. Paschen: Okay. Yang: Okay. I was fortunate. I had taken a set of plates off of another vehicle in a dark parking lot somewhere one night. But then one day, as I was walking down the sidewalk... where was I? I was walking down Belmont somewhere near Western. Yea, I was walking down Belmont somewhere. Belmont and also somewhere Western, and I happened to see it. A plate that had fallen off, somebody's front plate had fallen off into the bushes right there. I was like... okay? So the plates aren't even registered to the vehicle. Even if they got a hold of the rental car, here we are a year and a half later... I guarantee you that there's no evidence there Yang: We dumped everything. Paschen: We dumped the plates, we dumped the um, the, the, those, that stuff for the gun. (People's Exhibit 290, pg. 2)</p>

EXHIBIT A

Page 3 of 3

Christi Paschen Written Statement to Investigators
on 2/27/09 and 2/28/09

2/27/09: Marni later told me she disposed of the gun by putting it in a bucket of concrete and buried the bucket and said it would never be found
02/28/09: Marni also told me that she placed the gun she used in cement inside of a bucket on Friday and disposed of the bucket on Saturday after her cement dried. Marni said she buried the bucket in the ground of a forest preserve near water.

Marni Yang Statements During Denny's Overhears
on 3/1/09 and 3/2/09

3/1/09 - **Paschen:** *I helped you do something you knew I didn't want any part of. I wish you had listened to me and let the universe do what it was supposed to do. But you wouldn't listen. When you hid the gun, did you hide it real well?*

Yang: *It's gone. It's gone. It's so far gone, it's... I put it into a bucket of cement. I threw it in a dumpster. Far from my house.*

Paschen: *I thought you were going to put it in the forest preserves?*

Yang: *It went into a dumpster and it went to the dump -- somewhere in Chicago -- wherever they dump. And that was a year ago. They're never going to get it. They don't have the murder weapon.*

Paschen: *But, I thought you told me you had it in the forest preserve? You went in and out of the forest preserve.*

Yang: *Right, and when it came to getting rid of it, I didn't feel comfortable dumping it anywhere. There were always too many people around. So I waited until the middle of the night, this was a couple days, it was before they even had time to come. The police were still running in circles looking for the teenager. I put it into a bucket of cement. Okay, incased it [unintelligible]. Put it into a bucket of cement. I took that bucket, like a construction bucket, that's all, and went into a dumpster somewhere behind some stores. The garbage man comes, empties it, takes it to the city dump. It's under tons and tons and tons of Chicago trash. It's gone*

(People's Exhibit 289, pg. 8)

PEOPLE'S EXHIBIT 289

Marni Kay Yang's Overhear on 03/01/09
Beginning Time: 10:32 PM

Officer: Testing. Alright, bring this back up.

Paschen: Mhm.

Officer: And we're great. Look to your right.

Schletz: All I'm saying is – look – when you guys are all, whenever you're done, whenever you guys are done. Okay, talk about things, discuss the issues and details about what happened – whatever, what things are. When we've ended up, if you... even if she gets keyed or you get a little keyed, at the end, take it down. I'm sure things will be fine. You know, we'll figure this out. Whatever. Know what I mean?

Paschen: Okay.

Schletz: We don't want her going... we want her walking out being okay.

Paschen: Okay.

Schletz: "Christi says it's going to be okay, I say it's going to be okay. Things are going to be okay." Whose keys?

Detective Bauman: I gotta put a header on this.

Paschen: That's not mine.

Detective Bauman: That's mine.

Schletz: Okay. You good?

Detective Baumann: Okay. For voice identification, this is Detective Baumann of the Gurnee Police Department. The following overhear will be in reference to a Lake County Major Crimes Task Force Case. The following conversations will be between Christi Paschen and Marni Yang. For voice identification, please state your name.

Paschen: Christi Paschen.

Detective Baumann: Do you give your permission for the following conversations to be overheard and recorded?

Paschen: Yes.

Detective Baumann: Okay, today's date is March 1, 2009. The time now is approximately 10:32 PM. This overhear will now commence.

Paschen: Okay. Hello. Mhm. Alright.

Officer: Alright?

Paschen: Does anything look like...

Officer: What's that?

Paschen: ...you can see anything on me?

Officer: No.

Paschen: Okay.

Officer: It's fine. Okay, are you in your car?

Paschen: Mhm.

Officer: Um, give us a couple of minutes...

Paschen: Okay.

Officer: [Unintelligible].

Paschen: Okay.

Officer: [Unintelligible].

Paschen: Yea, I know where I'm going.

Officer: Okay.

Officer: Just get in the car and give us like five minutes.

Paschen: Okay. Must be legal.

Paschen: You're joking. Christi we've got this shit? Ah, fucking lunacy – can't fucking tell with this goofy-ass weather anymore. Tell her I'll be right there, I've got to go to the bathroom. We may have trouble, folks. A piece came out and was hanging down – I don't know if she saw it or not. Hopefully she didn't see the piece. I'm so fucking tired, Marni. Oh, I can't do it; you know that – I'm just too fat.

Yang: Oh, I kind of like you that way.

Paschen: Well, you know, remember I told you about my friend and I wanting to go down to Cancun and being the "Great Whale Alert."

Yang: Yea.

Paschen: Great White Alert. What can I tell you? I'm tired. They ran me through all the same shit.

Yang: Mhm.

Paschen: Again and again and again and again. Except for the, yep. Frost came in, Mr. Hardass, had come to my house.

Yang: Mhm. Who was with you?

Paschen: No, he just came in all by his happy-ass lonesome. Threw down two papers on my table.

Yang: Mhm.

Paschen: Looked at me and went, "Just that you know, this isn't all we have."

Yang: What was it?

Paschen: One was a rental car agreement.

Yang: Mhm.

Paschen: Marni Yang - delivered to my house.

Yang: Okay.

Paschen: And the other one was a prepaid cell phone.

Yang: Okay.

Paschen: With a phone number to my work.

Yang: Okay.

Paschen: And he threw it down, and he said, "This is your chance. Talk."

Yang: Okay.

Paschen: I told him I didn't know anything. He said, "Think about it." Then left. I don't know how long he left me; I don't wear a watch. He came back – wanted to know. "What?" I said, "I don't know anything about it." He said, "Get out of here – go. It's your head."

Yang: What did he say?

Paschen: He said, "It's your head."

Yang: Okay.

Paschen: Okay. They all kept looking at me.

Yang: Mhm.

Denny's Server: Can I get you anything to drink, ma'am?

Paschen: Yea, what type of tea do you have?

Denny's Server: Uh, herbal... the herbal tea, the decaf tea, and the regular, Lipton tea.

Paschen: I guess regular.

Yang: The orange... the orange one was the one I had.

Paschen: You bought the orange?

Denny's Server: Herbal?

Paschen: Orange, whatever the....

Denny's Server: The herbal? Were you guys ready to order or...

Yang: What kind of soup do you have?

Denny's Server: Uh, after ten, we don't have none.

Denny's Server: You guys still need a couple more minutes?

Paschen: Umm, give me a minute. I'm probably going to have something ice cream.

Denny's Server: Want me to go get your tea and come back and take your order?

Paschen: Yea.

Denny's Server: Okay, I'll be right back.

Paschen: I'm not doing a lot.

Yang: I don't want anything, really.

Paschen: I can't get my left ear to pop.

Yang: So what did you say – that that's not all they have?

Paschen: He said that's not all they have.

Yang: If they had anything that they, if they had anything substantial, they wouldn't have been coming to you. They would have been coming to get me. Okay?

Paschen: What do you think they would have? What could they find, Marni? What, I mean...

Yang: This rental car was the only – what else could there be? (*Redacted*). Nobody could identify me driving away from the scene. First of all, what they told you about that rental car being seen near the crime scene, I doubt that very much. I think that was for effect. Okay?

Paschen: Okay.

Yang: (*Redacted*). "A prepaid cell phone," I said, "I have teenagers in my house." I said, "Do you want me to tell you how many prepaid cell phones that we've gone through in our house in the last couple of years? 'Cause my kids are losing a phone every freaking week."

Paschen: Ha. I never realized that.

Yang: Okay? Oh, yeah. They've always had prepaid cell phones. I made the mistake, a couple of years ago, of getting them T-Mobile phones.

Paschen: Mhm.

Yang: And, uh...

Paschen: That does smell good.

Yang: ... and I still...

Denny's Server: Are we ready to order, ladies?

Paschen: What do you have in ice cream?

Denny's Server: Uh, chocolate, vanilla, and strawberry.

Paschen: Chocolate would be nice.

Denny's Server: Uh, one scoop or two scoop?

Paschen: Two.

Denny's Server: Two scoop?

Paschen: A little bit of whip cream.

Denny's Server: A little bit of whip cream?

Paschen: I'm not real hungry – just need something, want something.

Denny's Server: And for you ma'am?

Yang: Oh, nothing, I'm good.

Denny's Server: Okay. I'll take the menus. Be right back.

Yang: *(Redacted)*. Prepaid cell phones don't keep track of what numbers you call. So how could they have had your work number sitting there?

Paschen: I don't know.

Yang: Did you see it in front of your face?

Paschen: Yes. When he threw it down...

Yang: Mhm

Paschen: ... he had the, the page for the prepaid cell phone.

Yang: Mhm.

Paschen: He said it was bought at Walmart and it was a page attached to the back of it that showed the numbers dialed.

Yang: Okay. There would have only been two numbers dialed - the rental car place and yours - one quick call to you. Okay? *(Redacted)*. "Do you know how many, do you know how many prepaid cell phones we've gone through in our house in the last two years?" I can't even keep track of them all.

Paschen: Okay, I don't know. They were just...

Yang: And as far as the rental car goes, *(Redacted)*.

Paschen: Wait, why would you say you rented a car for me? Okay, number one...

Yang: I said, "I don't remember when it was, though." I said, "I don't remember when it was." *(Redacted)*.

Paschen: Why would you put my address? Ooh, okay, thank you.

Denny's Server: Can I get you ladies anything else right now?

Yang: No.

Paschen: No, I think I'm good.

Denny's Server: Okay, you guys need anything just let me know.

Paschen: Why would you put my address?

Yang: 'Cause that's where they needed to come pick me up – that's not where I put. That's where they came to pick me up – the rental car place – 'cause that's where I left my car. So what else did they say?

Paschen: It was like... Frost just looked at me and went, "What, you think I'm going to hand you, on a silver platter, everything we have?" He said, "That's not how this works." He said, "I'm giving you a chance to step up and do what's right. This is your chance - take it or leave it.

Yang: Of course that's what he was going to say. *(Redacted)*.

Paschen: I'm scared, Marni.

Yang: Okay, you're not the only one.

Paschen: I helped you do something you knew I didn't want any part of. I wish you had listened to me and let the universe do what it was supposed to do. But you wouldn't listen. When you hid the gun, did you hide it real well?

Yang: It's gone. It's gone. It's so far gone, it's... I put it into a bucket of cement. I threw it in a dumpster. Far from my house.

Paschen: I thought you were going to put it in the forest preserves?

Yang: It went into a dumpster and it went to the dump – somewhere in Chicago – wherever they dump. And that was a year ago. They're never going to get it. They don't have the murder weapon.

Paschen: But, I thought you told me you had it in the forest preserve? You went in and out of the forest preserve.

Yang: Right, and when it came to getting rid of it, I didn't feel comfortable dumping it anywhere. There were always too many people around. So I waited until the middle of the night, this was a couple days, it was before they even had time to come. The police were still running in circles looking for the teenager. I put it into a bucket of cement. Okay, incased it [unintelligible]. Put it into a bucket of cement. I took that bucket, like a construction bucket, that's all, and went into a dumpster somewhere behind some stores. The garbage man comes, empties it, takes it to the city dump. It's under tons and tons and tons of Chicago trash. It's gone

Paschen: Okay.

Yang: Why?

Paschen: I'm just worried.

Yang: Okay. Relax, there's no way they can get that. It's gone.

Paschen: I mean, come on, think about it. You know how, you've known me how long? You know my birthday curse. Okay?

Yang: Yes, okay.

Paschen: My birthdays not even here till Thursday so... and I still haven't had the talk with Dominica yet. She avoided me – granted I haven't been in because I haven't been fit for public consumption. But I don't know what else to do.

Yang: Okay. Relax. There is no one anywhere that can place me, or you, at the scene. Okay? They have no evidence tying me or you to the scene, 'cause if they did, I'd be in custody right now. They did what they do best. Just try and rile you up.

Paschen: Okay. Well, you know, I'm already riled.

Yang: I know.

Paschen: I mean, I, Dominica, this has been hell week.

Yang: I know.

Paschen: Then pop. Don pops up. He's going to be fired within the next two months. You know, there's not a whole lot I can do about this.

Yang: Well he's eligible for unemployment, so just relax.

Paschen: Fine but how long was that? He was unemployed for a year, Marni.

Yang: Okay, well six months worth of unemployment is a start, is a start. And you know he wasn't looking very hard for a job that entire time.

Paschen: He was, he was just trying to get an engineer, an engineer's job because that's what his degree is in. But, this is why I'm scared, okay? So of course I'm going to finally ask the question I fucking told you I never ever wanted to know.

Yang: But were they [unintelligible]?

Paschen: No.

Yang: But are they going to find it? It's gone.

Paschen: Alright, fine.

Yang: Okay? It is, it is gone under a year and a half's worth of Chicago garbage at the city dump.

Paschen: Alright.

Yang: Okay. And, on top of that, it's incased in cement, in a bucket that looks like a construction bucket. It looks like it came from a construction sight. That's all.

Paschen: Alright. That's just it, I just...

Yang: Okay.

Paschen: Too much.

Yang: I know.

Paschen: Too wired, too sick. I still have to go tackle Leevie. You know, I, I don't know what else to do. So, I just... I had to retreat inside my own head.

Yang: That's fine, that's, that's perfectly okay.

Paschen: This is good chocolate. Is there anything you can think of that I should worry about?

Yang: I can't, I can't think of anything else. Again, there's nothing that ties either you or I to the scene. They had any of that... DNA evidence... First of all, why does it take them a year and a half to come up with a rental car agreement? This is not something that they would have known before?

Paschen: I don't know.

Yang: This isn't, this can't be new information.

Paschen: I don't know. I, I don't know what to tell you. All I know is that's what they threw in front of me.

Yang: Mhm.

Paschen: And Frost made it a point –(Redacted)– he comes in, Mr. Hardass, and dumps it on me. You know, and just stands there and stares at me. And then he's like, "I'll think about it," and walks away.

Yang: Mhm.

Paschen: And then comes back in – I wasn't sure if he was going to break the chair when he popped out of the chair and looked at me and went, "Well." He's like, "We're offering you a chance."

Yang: Well that's exactly, exactly what his job is. Okay?

Paschen: So, I just – I said I didn't know anything. And that was the end of it. I mean, then he let me go.

Yang: Mhm. I find it... why do you think that if they had a question about that that they wouldn't come to me, pick me up and say, "Explain this."

Paschen: I don't know.

Yang: Why wouldn't they come get me?

Paschen: I'll... I'll... I... first off, I was whigged. I mean, obviously it came to my house.

Yang: Right. Well because of the fact that they picked me up, the, the rental car, they wanted to know what address to come get me. Okay, it's, "Enterprise: we pick you up."

Paschen: Yea, fine...

Yang: So, the point is – number one, it's not illegal to rent a car. I wasn't hiding anything. Okay? I did it with my own credit card and my own driver's license so I wasn't hiding anything. You needed a rental car. I was having problems, you needed to get to

work, you needed to get wherever. And you couldn't do it because your credit card is no good; you didn't have enough so that they insist on putting a 250-dollar deposit on your credit card. They hold that there so you couldn't because your credit card was maxed or you couldn't put it on your card – whatever – they wouldn't clear it, so I did it for you. So what? Big deal. You only needed it for a day. Whatever?

Paschen: Fine.

Yang: That's it. That's all.

Paschen: Fine.

Yang: *(Redacted)*.

Paschen: *(Redacted)*.

Yang: *(Redacted)*.

Paschen: That's fine. I'll just let it go.

Yang: Okay.

Paschen: I just, on top of everything else this week.

Yang: I know, I'm aware of that. *(Redacted)*.

Paschen: Alright. I don't know. I just – on top of everything else, the birthday hell, I just...

Yang: I know. Okay.

Paschen: ...I didn't know what else to do. I...

Denny's Server: Would you ladies like any more water?

Paschen: No, I think I'm good.

Denny's Server: You're doing okay? Alright.

Paschen: I just needed to quiet down. I needed to just not be anywhere – it's not like you haven't seen me not fit for public consumption before.

Yang: I have, okay. I mean, and that's why I'm here, in the public consumption. Okay?

Paschen: Okay. I just wasn't fit for anything, I...

Yang: I wouldn't have gone up there. I would have told them you'll meet with them with your attorney. Okay? "Here's my attorney's phone number. Call him."

Paschen: First off, with everything so up in the air at work...

Yang: Mhm.

Paschen: There were at least two people more that they're firing.

Yang: Okay. You don't want that to be you. I know, I'm aware.

Paschen: Okay. I couldn't afford it. I can't afford it. And, on top of the fact that I'm already "persona non grata," they still haven't told me what they're dropping me down. It could be a drop of 4400-dollars, which is 200-dollars every paycheck. It's a lot of fucking money, Marni.

Yang: I'm aware of that, okay?

Paschen: And I just, you know, and then Don's wonderful revelation, I mean I just... it was just too much. I...

Yang: It's like...

Paschen: I was on overload.

Yang: It's like my dad said, "Right foot, left foot, right foot, left foot" – that's all you can do. But, I... remember when I was talking to your friend, Marie? I had asked her if we were going to be hassled on the case anymore, and she said no she didn't think so – that she didn't see it. Okay? So...

Paschen: Alright, then I'll just let it go.

Yang: I think it's important to keep it here. I think it's important to try to figure out what their next move might be.

Paschen: Well, if you don't think there's anything they can find, then...

Yang: What else could there, there's nothing else? They searched, they went...

Paschen: Fine.

Yang: They searched my house; they turned it upside down. Okay? They took everything that they could possibly take. They've run through all my finances. They, there's no way that this could be new information that they just got. Okay?

Paschen: Okay. I don't know. I don't know. I just, on top of everything else, as wired as I've been...

Yang: Mhm.

Paschen: ... not feeling well, the migraine that was going on that has been in the back of my head, which maybe those headaches that go with that tumor that we think I might have in my, you know, the parathyroid tumor. You know, it was just, I mean, that started out hell week. It just went from there. And then that, I, I, I didn't know what to do. I just was like - I collapsed, I needed sleep, I haven't been sleeping right.

Yang: Mhm.

Paschen: Jimmy drinks. You know how those would kill me.

Yang: I know that and I think that those were actually maybe a premonition to this. Okay?

Paschen: Yeah.

Yang: I think that that was a premonition to this.

Paschen: Well... I was pregnant when he was trying to threaten me with, you know, I mean, the whole thing was just horrible. I mean, I, you get to a point where enough is enough already. I just didn't know what else to do.

Yang: No, that's fine. Um... I'm just concerned about... well, concerned about a couple of things. Okay? I'm concerned about your state of mind, first of all. Okay? I'm concerned about where this little impromptu interview came from. You know, like I said, whether it's them just shaking the tree, or whether they're gearing up for something.

Paschen: I don't know. They sure as shit weren't offering anything. Other than that, there was nothing they offered. It was just, "What was this? You said this. Tell this again." I, I mean round and round and round and round and round... you know.

Yang: Was it stuff that they had asked you before?

Paschen: Yeah...

Yang: Like what, specifically?

Paschen: My timeline mostly. It was, you know, work and stuff like that.

Yang: Mhm.

Paschen: You know...

Yang: That's all verifiable.

Paschen: Right – so, I mean, I was just... I don't know. I mean, not long ago, I mean, my work schedule has changed.

Yang: Right.

Paschen: I don't remember....

Yang: Your company will have a record of it; I guarantee you, they've already done the research and they've, they've verified you that were at work that day. I guarantee you they've already done it. Okay? So the only gap that needs to be filled in is with the rental car. I mean, the fact of the matter is... stop shaking.

Paschen: You know this happens. This was – I've had since before I met you.

Yang: The fact of the matter is, is that, hey, you know what, you had car problems, you couldn't get a rental car by yourself 'cause your credit card was no good. I got one for you, so what? That's what friends do. That was the day before; that wasn't the day of. Okay?

Paschen: Mhm. Alright.

Yang: That was the day before. I got the car for you, you know, you drove it around for a day or whatever and then you didn't need it anymore. Or you can turn around and say, "You know what, I got my, I got my car running and I didn't need to use it at all. It's, it parked it in front of my house." Period.

Paschen: Why did you let me think it was the forest preserve?

Yang: Because prior to... prior to... in the weeks prior to, I was riding around trying to find an ideal spot. Each place that I went I was not comfortable with.

Paschen: I thought you did that then, I didn't think you did that before.

Yang: No. I used - I spent weeks, weeks, weeks trying to find the perfect spot that wasn't going to be seen. Okay? I said I did better – I incased it in cement. Huge, big, big, huge bucket. Okay? Incased in cement, waited until after dark, threw it in a dumpster. All over. Behind a Dunkin Donuts somewhere.

Paschen: Okay.

Yang: And [unintelligible]. Oh, goodbye, it's gone.

Paschen: Okay.

Yang: Okay.

Paschen: Well... I think I'm calm.

Yang: Mhm.

Paschen: It's more... I still have to deal with Dominica, and I'm gonna to have to do that soon. So that, right now, that's where I'm focusing.

Yang: Okay.

Paschen: Because I have to deal with her, and I have to... figure out how to confront her and not confront her at the same time.

Yang: I would say don't take the, don't take a defensive approach. Just go in there with all your guards down and say, "Look, I, you know, I've been here a couple of years - thought I was doing really well. I just, you know, I can understand maybe trying to cut costs or something somewhere." Don't even address the politics of the whole thing. Okay? Think you're goal right now - you can work your way back up later. I think your goal right now is to try to... be sure your job is still stable. And I think you can best do that by approaching her with your hand out this way. Okay?

Paschen: Okay.

Yang: Just say, "You know, look." Say, "I'm, you know, I'm upset about it." Say, "You know, I understand we're trying to cut costs around here, whatever, but, you know, I'd kind of like to know what precipitated it. What, what was the reason for that?" Once she comes out with her answer, you will know whether she's telling the truth or not. Whether it's a favoritism thing or whether it was because of your numbers. Don't give her any response right away. Give yourself some time to think about it.

Paschen: It was based on my numbers; she told me that.

Denny's Server: You doing okay over here, ladies? Okay.

Yang: Yea, we're fine.

Paschen: Yea. We're fine. She told me it was on numbers because she compared me to Zack.

Yang: Okay, did you tell her Zack gets numbers fed to him?

Paschen: I just looked at her and went, "Let's get real," and she's like, "However Zack gets his enrollments, he get's his enrollments. That you're supposed to be producing to

match him." So, I mean, it, it's just been a cluster-fuck. I don't want to keep you up. Okay?

Yang: I'm fine, okay?

Paschen: No, I need to go to bed. But I know I need to come out...

Yang: Mhm.

Paschen: ... and I figured, if anything else, it's not that you're not a night owl, I know that. I just needed, I knew you needed to hear from me. And I figured...

Yang: I needed to hear that you were okay. Okay?

Paschen: I figured this was the better way to do this.

Yang: Yeah, oh, absolutely. I needed to hear that you were okay. I needed to hear what was said.

Paschen: I know.

Yang: I needed to hear what your impression of the situation is, which I don't know that you're going to be able to give me at this point.

Paschen: I don't know. I don't know whether they're playing games. They seem deadly serious. They seem that they have their, their act... like they believe they have their ducks in a row.

Yang: Mhm.

Paschen: Do they? I don't know. I really don't know. But...

Yang: If they had their ducks in a row, then they wouldn't have been sitting down to question you. If they had their ducks in a row, they'd be at my doorstep with a pair of handcuffs.

Paschen: Okay.

Yang: *(Redacted)*.

Paschen: *(Redacted)*.

Yang: Okay?

Paschen: Then I'll let it go. And I'm going to go home. But I'm just letting you know, I figured, "Okay, I was awake."

Yang: Mhm.

Paschen: This would make you feel more comfortable, letting you know, I'm not losing my mind. It was just my birthday curse.

Yang: I know, I'm... sure it's more than that. But, one of the things that I need to try to determine is – like I said - if they're just looking to shake the tree or if they're gearing up for something.

Paschen: All I know is what I told you.

Yang: Mhm.

Paschen: It's why I asked you. It's why I asked you.

Yang: Yea, there, there's... they can't have, have murder, they can't... are they going to dig it under, out from under a year a half's worth of trash at the Chicago city dump? There's no way.

Paschen: Fine.

Yang: [Unintelligible].

Paschen: Fine. I just... I didn't know what to do. And I just needed to just close down and just let it go. I had to sleep, I had to just go inside myself and say, "To hell with it." I didn't know any other way to do it.

Yang: No, it's fine.

Paschen: I mean it's not like you haven't seen me do that stunt before.

Yang: No, you have. Okay. But, now that I know that you're okay...

Paschen: Mhm.

Yang: Like I said, the second thing on my mind is... do I need to start worrying about being paid a visit from them?

Paschen: I don't know. They gave me nothing other than that.

Yang: But they did indicate to you that that's not all they have.

Paschen: Well, they looked at me – the way they were acting....

Yang: Mhm.

Paschen: ... was that they pretty much had it all sewn up.

Yang: If that's the case, they wouldn't have let you walk out. *(Redacted)*. These gentlemen waste no time.

Paschen: Okay.

Yang: Okay.

Paschen: Then I'm just gonna let it go.

Yang: *(Redacted)*.

Paschen: Okay. Can we go?

Yang: Yea. I'll get it.

Paschen: Oh.

Yang: *(Redacted)*.

Paschen: Yea.

Yang: [Unintelligible].

Paschen: I know. I just don't know what to make out of it. I'll see you later. Marni, see you later. Talk to you later.

Yang: Alright. Are you going to work tomorrow?

Paschen: I don't know.

Yang: *(Redacted)*.

Paschen: *(Redacted)*.

Yang: Okay?

Paschen: If I'm not feeling good, I won't have the phones on.

Yang: Okay.

Paschen: Alright.

Yang: I'll e-mail you then. Nah, you know what? Get a hold of me when, get a hold of me tomorrow evening then if I can't get a hold of you in the afternoon.

Paschen: Alright.

Yang: Okay.

Paschen: *(Redacted)*.

PEOPLE'S EXHIBIT 299

TRANSCRIPT OF FEBRUARY 28, 2009 PHONE CALL, TIME: 11:33 P.M.

NUMBER DIALED: (773) 593-2998

Ring...

Marni: Hello

Paschen: Hi

Marni: And

Paschen: I am fucking dying of tired, around and around and around and around and around all the same fucking questions and just before they let me go they came in and looked at me and went why was a rental car delivered to your address and that was seen around the crime scene and why did you get a cell phone, why did you buy a pre paid cell phone, I looked at them and I don't know what the fuck this is, they are wanting to know what this is, I don't know what the fuck this is Marni, I just looked at them and said I don't know what the fuck you are talking about and they just looked at me and were like think about and then left and they came back a half an hour later and said what, tell them I didn't know what they were talking about I have no fricking clue

Marni: What the hell are you talking about

Paschen: I don't know some rental car that was delivered to my house that was seen in front of over at the crime scene and that there were some like, one of those throw away cell phones that you buy that you buy it with a certain number of minutes on it and throw it the fuck away, I don't know! So finally they just let me go and I am going home, I am fucking tired, I got get up to go to fucking work tomorrow and I cant think. So I will talk to you later I am just to tired I am turning off the fucking phone and I just got to go to bed. I just can't think.

Marni: O.K.

Paschen: I mean I went over everything with them that I could remember but they were on and on about this phone about the car, I don't know what the hell that is, I don't know so you think about I am to fucking tired to think about it.

Marni: alright we will start making shit up

Paschen: Alright, whatever, I am going

Marni: Call me tomorrow.

End conversation.



PEOPLE'S EXHIBIT 303

TRANSCRIPT OF MARCH 2, 2009 PHONE CALL, TIME: 7:34 P.M.

NUMBER DIALED: (773) 593-2998

Ringling...

Ringling...

Brendon: Hello.

Christi: Hi, It's me.

Brendon: Hi.

Christi: Hi. You sound awful. You got a stuffed up head?

Brendon: No.

Christi: Oh.

Brendon: It's Brendon.

Christi: It's what?

Brendon: It's Brandon.

Christi: Oh, Okay. (laugh) Where's your mom, Brandon?

Brendon: Ah, she's in the bathroom right now.

Christi: Oh, okay. Then um, tell her to give me a call back on the cell.

Brendon: Oh, she's says to hold on one second.

Christi: Okay.

Brendon: Alright... It's Christi. Can I just hand you the phone?

Marni: What?

Brendon: Can I just hand you the phone?

(background noise)

Marni: Hello?

Christi: Hello, its me.

Marni: How are you?

Christi: Ah, okay I'm out, I'm picking up my pills. I forgot, again. Whatelse is new? So.

Marni: Did you go to work?

Christi: No. I didn't.

Marni: Okay, cause I emailed you to see if you were...

Christi: Oh. No I didn't. umm.

Marni: You just needed (un-intellagable)

Christi: I, I, I, yeah, I needed an extra day. I took a long nap this afternoon. When I woke up, I remember another question that Detective Frost asked me.

Marni: Okay.

Christi: And, I wanna talk to you about it.

Marni: Okay.

Christi: Can you meet me?

Marni: Umm, tonight.

Christi: Yeah.

Marni: Okay. Umm, it is 7:30.

Christi: Yeah.

Marni: I'll be there in (sigh) an hour.

Christi: In an hour. Okay.

Marni: um-hum

Christi: I'll see you then.

Marni: Alright, bye

Christi: Bye